

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From July 1, 1952
through September 30, 1952

VOLUME 68

SI GARRETT, Attorney General

Attorney General:

Si Garrett

Assistant Attorneys General:

J. W. Arbuthnot
Lee Edward Barton
Thomas M. Galloway
Mary Lee
William N. McQueen
M. Roland Nachman
Thomas F. Parker
Maury D. Smith
Robert Straub
Bernard F. Sykes

Assistant Attorney General assigned to the Department of
Agriculture and Industries:

George O. Miller, Jr.

Assistant Attorney General assigned to the Department of
Conservation:

A. J. Harris

Assistant Attorney General assigned to the Department of
Examiner of Public Accounts:

James T. Hardin

Assistant Attorney General assigned to the Department of
Finance:

Randolph G. Lurie

Assistant Attorneys General assigned to the Department of
Revenue:

H. Grady Tiller
Willard W. Livingston
William H. Burton, Jr.

Confidential Secretary
Mrs. Dorothy G. Johnson

QUARTERLY REPORT
of the
ATTORNEY GENERAL
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Volume No. 68

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1952, through Sep. 30, 1952, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,
Attorney General.

OPINIONS

July 1, 1952

Hon. William R. Lauten

Circuit Solicitor

28th Judicial Circuit

Baldwin County

Bay Minette, Alabama

Solicitors — Sheriffs — Court Reporters.

1. A circuit solicitor, under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940, may request a sheriff, in writing, to make an investigation of a criminal case.

2. In the course of a sheriff's investigation in a criminal case, directed in writing by a circuit solicitor, he may obtain a certified transcript of the proceedings and testimony at a former trial and the expenses of such transcript may be included in the expense of the investigation and paid by that county governing body.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your letter of June 7, 1952, addressed to Mr. John Graves, State Comptroller, has been forwarded to this office for reply. Due to the nature of the inquiry, I deem it advisable to answer it by an official opinion. Your letter is as follows:

"A recent case, charging the defendant with a felony, ended in a mistrial, the jury being unable to agree. Quite naturally, the testimony taken at the former trial will be quite helpful to me in preparing and almost indispensable in conducting a new trial under the same indictment.

"Please advise me whether your office will reimburse me for the cost of the reporter's transcript as an office expense."

In my opinion the county governing body is authorized to pay the expenses incurred for obtaining the court reporter's transcript of the proceedings at the trial referred to in your inquiry.

In an opinion of this office, under date of April 20, 1944, found in Quarterly Report of Attorney General, Vol. 35, page 25, it was held that there was no authority by which a court reporter could be paid for a transcript

of his stenographic notes taken on a preliminary trial of a felony case resulting in a mistrial. Since that opinion was rendered, this office held, in an opinion to Honorable Henry W. Smith, President, Board of Revenue, Etowah County, dated January 15, 1952 (Ms.), that the county governing body has authority under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940, to pay the expenses incurred by the sheriff in having a transcript made of testimony to be used in the presentation of a perjury case before the grand jury.

The latter opinion is based upon the principle that the circuit solicitor, under the provisions of Sections 9 and 10, *supra*, may, in writing, direct the sheriff of the county to investigate any violation of the law. The expenses of such investigation, when so ordered in writing by the solicitor, may be paid for out of the county treasury.

In my opinion the solicitor, in the case of a mistrial, may, in writing, direct the sheriff to investigate the case which resulted in a mistrial, and in the course of such investigation the solicitor may direct the sheriff to obtain a certified copy of the proceedings and testimony taken at the trial which resulted in a mistrial. Then, in accordance with Section 10, *supra*, the sheriff may claim the expenses of obtaining such transcript from the county treasury by filing his claim with the county governing body. Under such circumstances, it is my opinion that the county governing body is authorized to allow the payment of such claim.

It is unnecessary to overrule the opinion of the Attorney General of April 20, 1944, *supra*, because the method of payment proposed in that instance was not the same as is here suggested.

You will note from Section 10, *supra*, that the county governing body has authority to audit and allow only so much of the claim for expenses incurred by the sheriff in such investigation as it shall find reasonably necessary, unless it is approved by the Governor or the Attorney General, in which event the county governing body shall allow the amount approved.

I suggest, therefore, that unless the Governor or the Attorney General authorizes the investigation, and the statement of the expenses of such investigation filed by the sheriff is approved by the Governor or the Attorney General, you should obtain a prior commitment from the county governing body concerning the payment of the claim.

Yours very truly,

SI GARRETT

Attorney General

July 7, 1952

Hon. Bert E. Thomas

Tax Assessor

Mobile County

Mobile, Alabama

Tax Sales — Ad Valorem Taxes — Refunds.

A purchaser at a tax sale or by a tax deed is entitled to a refund only under the conditions set forth in Title 51, Sections 297 et seq., Code of Alabama 1940; such purchaser is not entitled to a refund because others are in possession of property or claim a superior title thereto.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, addressed to my predecessor, is as follows:

"On March 1, 1950, Orion H. Parker, Jr., Rt. 1, Box 109, Whistler, Alabama, purchased State Deed No. 14596 covering land described as 'W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 10, T2S, R1W,' which was sold on July 22, 1941, under an assessment to Willard Johnson.

"It subsequently develops that taxes on the above described land were regularly paid for the years 1942 through 1949, and Mr. Parker has requested that a petition be made for refund of his money paid in the purchase of the above deed. I can find no evidence of a duplicate assessment for the year 1940, but the price of the deed was based upon taxes on the above land for the years 1940 to 1950 inclusive, and as I have mentioned above it appears from the records in the Tax Collector's office that taxes on the above land were regularly paid for the year 1942 through 1949.

"Please advise me whether it would be proper to petition for refund of the money paid by Mr. Parker, either in whole or in part."

In your letter of November 13, 1950, you have supplied this office with the following additional information:

"I have your letter of November 6, and wish to furnish you with the following further information regarding this case:

"Land described as W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 10 T2S R1W was sold to the State for 1939 taxes under the name of Willard Johnson, and the

certificate covering this sale was subsequently transferred to H. A. Waltman on September 3, 1940. Waltman, apparently confused as to the taxes included in the price for which the certificate was transferred, failed to pay the taxes for 1940, and the land sold for 1940 taxes to the State of Alabama.

"Let me say by word of explanation that it has long been a custom in Mobile County in cases of transfers of certificates to keep the assessment in the name of the person to whom it was originally assessed until such time as the purchaser of the certificate obtains a Probate Judge's deed, restricting the paying during the three year period, however, to the person to whom the transfer was made.

"There is not any indication on the records of a 1941 payment of taxes on the land in question, but in 1942, taxes were paid by Waltman, and likewise Waltman paid the 1943 and 1944 taxes. Waltman received a Probate Judge's deed under the 1939 tax sale on October 21, 1944. Waltman failed to assess under the Probate Judge's deed, and the above land, still in the name of Willard Johnson, was assessed for 1945 taxes. The 1945 taxes were unpaid, and the land sold for 1945 taxes to Madeline J. Powers. Waltman redeemed from this sale to Madeline J. Powers, and taxes for 1946 covering the above land were paid under an assessment in the name of Willard Johnson. For 1947 an assessment was made in the name of Curtis Rogers on the basis of a deed presented in this office. The taxes for that year were duly paid, and for 1948 an assessment was made in the name of DeWitt Ball under a deed presented in this office. The taxes for that year were duly paid, and for 1949 an assessment was made in the name of DeWitt Ball, and the taxes thereon duly paid. For 1950 the land was transferred on our books to D. C. Baldwin.

"You will observe that there was still outstanding during all of these transactions, a 1940 tax sale in the name of Willard Johnson covering the land in question, and that on March 1, 1950, Orion Parker purchased a deed from the State of Alabama covering the 1940 sale. Mr. Parker subsequently discovered that others were in possession of the land, and that the taxes thereon had duly been paid according to the records in the office of the Tax Collector for five years back. He concluded that although he did have a deed from the State of Alabama covering this land his chances for obtaining possession under the circumstances were very slight. He appealed to this office for a refund, and at that point the question of the legality of such a refund arose.

"We should appreciate your reviewing the above facts in conjunction with those outlined in our letter to the Attorney General dated June 2, 1950."

The rule seems well settled that a person who purchases property at a tax sale does so at his own risk insofar as defects in the title to the property are concerned. This rule is appropriately stated in 51 Am. Jur., Taxation, Section 1141, as follows:

"In the absence of any legislative change in the law, the general rule is that the doctrine of caveat emptor applies with full force against purchasers at tax sales, in favor of the county, municipality, or other taxing authority. The purchaser assumes the risk of all irregularities and illegalities in the proceeding: **** there is little dissent from the rule that in the absence of a statutory provision, the holder of a tax certificate or a tax deed issued at an invalid tax sale cannot, when the invalidity of his title is subsequently determined or becomes apparent, obtain reimbursement from the county, municipality, or other taxing body which received the money under such invalid sale, and this notwithstanding the increasing recognition by the courts of the fact that purchasers at tax sales serve a useful and necessary purpose in government economy. * * * The fact that statutes have been adopted in many states providing for refund of moneys paid under invalid tax sales is itself a strong argument against the existence of any right of recovery in the absence of statute. . . ."

Therefore, no right of refund existed at common law to a purchaser at a tax sale, or through a tax deed. The right to such refund, if any exists, is purely a matter of legislative grace, and is governed strictly by the expressed wording of the statute by which it is created.

Consequently, in the absence of a statute, money paid into the State Treasury under color of law is not subject to a refund. *Curry V. Johnston*, 242 Ala. 319, 6 So. (2d) 397.

Refunds of moneys paid for such lands, either at the tax sale or to the State for a tax deed, appear to be governed exclusively by Title 51, Sections 297, et seq., Code of Alabama 1940, and particularly by Sections 297 and 328 of the same title, which sections are very limited in their scope.

Section 297, *supra*, reads as follows:

"When land which has been sold for taxes and purchased by the State has been sold by the state at private sale, and the purchase money has been paid into the state and county treasuries, and it shall be made to appear to the satisfaction of the comptroller that such sale was invalid by reason of the fact that the taxes for which the land was sold were not due, the purchaser of said land from the state, his heirs, or assigns, shall upon the surrender of the deed from the state and the cancellation of the same, be entitled to have the purchase money paid for the said land refunded, if application shall be made therefor, as hereinafter provided, within two years from the date of the deed made by the state." (Emphasis ours.)

You state that the taxes for the year 1940, for which the property was sold to the State on July 22, 1941, were not paid, nor were they ever paid up to the time that the State conveyed the property by tax deed to Orion H. Parker, Jr., on March 1, 1950. The difficulty, therefore, encountered by the holder of the tax deed is purely one of title, or who has the superior title to the property. It is not a question of whether or not the taxes for 1940 had been paid and the property sold to the State by mistake for such taxes. The State does not warrant the title to such land. By virtue of the tax deed, and under Title 51, Section 276, Code of Alabama 1940, the section by which a tax deed is authorized to be executed by the State, the grantee's title and interest is limited to "all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto." Consequently, no recovery could be had under Section 297, *supra*.

Section 328, *supra*, reads as follows:

"Any taxpayer who through any mistake, or by reason of any double assessment, or by any error, in the assessment or collection of taxes, or other error, has paid taxes that were not due upon the property of such taxpayers, shall, be entitled, upon making proof to the satisfaction of the comptroller of such payment, to have such taxes refunded to him if application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

The purchaser at the tax sale does not enjoy the status of a "taxpayer." Section 328, *supra*, is limited only to refunds of taxes which were paid by error or mistake or by reason of double assessment by a "taxpayer."

There is no lawful way that I can find, under the circumstances, for the purchaser at said tax sale, or grantee under the tax deed, to receive a refund of the purchase money, simply because someone else is in possession of the property involved, or claims to have a superior title thereto. Such purchaser should have inquired about these things before he purchased the land through the tax deed.

Yours very truly,

SI GARRETT

Attorney General

July 25, 1952

Hon. H. R. Leeman

County Superintendent of Education

Morgan County Schools

Decatur, Alabama

Schools — County Boards of Education — City Boards of Education — Marriage.

Local school authorities do not have legal authority to exclude married persons, otherwise qualified for enrollment, from attendance in the public schools of this State.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of July 8, 1952, reads as follows:

"A problem has been brought to our attention about which we wish to ask your opinion. During recent years we have had increasing number of high school children to marry before completing requirements for graduation. Some of them desire to continue in high school after marriage. In some cases their conduct within the school, and because of their marital status, creates a problem which would not otherwise exist.

"The questions which we wish to ask regarding this matter are as follows:

"1. Does the County Board of Education have legal authority to exclude married people from attendance in the public schools?

"2. Does the local Board of Trustees and the principal of local schools have authority to exclude married persons from attendance in the respective local school?"

In my opinion, neither the county board of education nor the local board of trustees and the principal have legal authority to exclude married persons, otherwise qualified for enrollment, from attendance in the public schools of this State.

Section 256, Constitution of Alabama 1901, requires that the Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.

*Boards
below
have act*

Title 52, Section 297, Code of Alabama 1940, provides that every child between the ages of seven and sixteen years shall be required to attend a public school, private school, denominational school, parochial school, or be instructed by a competent private tutor, for the entire length of the school term in every scholastic year.

Title 52, Section 118, Code of Alabama 1940, provides that the county superintendent of education shall prepare, and submit for approval and adoption by the county board of education, rules and regulations governing the conditions under which children may be admitted to junior and senior high schools of the county.

While Section 118, *supra*, gives to the county board of education some discretion in the matter of the conditions of admittance to the high schools of the county, and while it is peculiarly within the province of the county board to determine what things are detrimental to the successful management, good order, and discipline of the schools in the county, and in the rules and regulations required to produce those conditions, any rule or regulation passed pursuant to the authority vested in the county board by Section 118, *supra*, must be reasonable, and the reasonableness of any such rule or regulation is a question of law for the courts.

Your specific questions have never been decided by the appellate courts of this State. They have been decided, however, by the highest court of our neighboring State of Mississippi. In the 1929 case of *McLeod et al., Trustees Moss Point Public Schools v. State ex rel. Colmer, Dist. Atty.*, 154 Miss. 468, 122 So. 737, 63 A. L. R. 1161, it was expressly held that an ordinance adopted by school trustees barring married persons, otherwise eligible, from attendance in the public schools, was arbitrary, unreasonable, and an abuse of discretion, and was, therefore, void.

In answer to the argument that the admission of married children to public schools is detrimental to the good government and usefulness of the schools, Mr. Justice Anderson replied as follows:

"Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life. And they are as much subject to the rules of the school as unmarried pupils, and punishable to the same extent for a breach of such rules."

See, also, 63 A. L. R. 1164, note; 47 *American Jurisprudence*, Schools,

Section 155, page 412; 56 Corpus Juris, Schools and School Districts, Section 1092, page 853.

Very truly yours,

SI GARRETT

Attorney General

July 30, 1952

Hon. W. W. Dinsmore

Secretary-Treasurer

District No. 1 Board of Trustees

Tuberculosis Sanatorium

Decatur, Alabama

Insurance — Hospitals — Department of Finance — Health and Health Department.

Funds appropriated by the State of Alabama were used for the erection and equipment of District No. 1 Tuberculosis Sanatorium at Decatur, and, therefore, the plant and equipment of the sanatorium must be insured through the State Insurance Fund.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 18, 1952, is as follows:

"Is it mandatory for the District No. 1 Tuberculosis Sanatorium, Decatur, Alabama to carry its insurance with the State Insurance Fund as provided in Section 317, Title 28 of the Code of Alabama, as amended September 19, 1949?

"This Sanatorium is operated under a Board of Trustees from all over this District. In the strict sense of the phrase it is not a political subdivision of the State of Alabama. Therefore, why wouldn't the matter of insurance be within the discretion of the Board of Trustees?"

It is my opinion that it is mandatory for the Board of Trustees of the District No. 1 Tuberculosis Sanatorium at Decatur to insure the plant and

equipment of the sanatorium through the State Insurance Fund of the State of Alabama.

Title 28, Section 317, Code of Alabama 1940, as amended by Act No. 675, General and Local Acts 1949, page 1045, provides that:

"There shall be a fund, to be known as the state insurance fund, carried by the state treasurer for the purpose of insuring against loss by fire, lightning, windstorm, and hail, all buildings in which title in whole or in part is vested in the State of Alabama or any of its agencies or institutions, or in which funds provided by the State have been used for the purchase of the land, construction of the building, purchase or maintenance of any equipment, furniture, fixtures, or supplies in such building; and all public school buildings together with the contents of all such buildings."

Act. No. 287, General Acts 1945, page 474, provides for the construction, equipment, and operation of district tuberculosis sanatoria in the State of Alabama, which is thereby divided into seven districts. The act, in part, provides that:

"On approval of the State Committee of Public Health the State of Alabama may contribute not to exceed three-fourths of the construction cost of each sanatorium not including the cost of the building site and provided such state participation does not exceed the sum of One Hundred and Eighteen Thousand Dollars (\$118,000.00) per institution. On the approval of the State Committee of Public Health the State of Alabama may contribute not to exceed three-fourths of the cost of equipment of each sanatorium provided such state participation does not exceed the sum of Seventeen Thousand Dollars (\$17,000.00) per institution. The state's participation shall not exceed three times the participation of the regional sponsor. With the approval of the State Committee of Public Health the regional sponsor may accept Federal aid in the construction of said sanatorium. If Federal Aid is granted in the construction of said sanatorium, the proportion of State and local participation as herein set out shall not be affected."

It is clear from the terms of Act No. 287, *supra*, that it was contemplated that moneys appropriated by the State, supplemented by federal aid and by local money raised in the sponsoring district, would be used for the erection and equipment of such tuberculosis sanatoria. In fact, I am advised by the Director of the Budget that as of January 30, 1950, about \$200,000.00 of the State Building Commission's funds had been appropriated and used in the erection and equipment of the District No. 1 Sanatorium at Decatur.

Therefore, in my judgment, the Legislature, in setting up the State Insurance Fund, clearly intended that institutions such as the Decatur san-

atorium must insure their plant and equipment through the State Insurance Fund.

Yours very truly,

SI GARRETT

Attorney General

July 30, 1952

Hon. Lawrence A. May

First Assistant

State Service Commissioner

Department of Veterans' Affairs
State of Alabama

Montgomery 2, Alabama

Barber Commission — Barber Shops — Licenses — Veterans —
Exemptions — Jefferson County.

The provisions of Section 5 of Act No. 661, General and Local Acts 1951, page 1125, control over the general laws exempting veterans from the payment of certain State, county, and municipal business and occupational license taxes; therefore, veterans are not exempt from the licensing provisions of Act No. 661, *supra*.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 21, 1952, is as follows:

"This Department would appreciate your official opinion on the following.

"Act No. 353, approved July 6, 1945, as amended by Act No. 698, Approved October 13, 1947, and Article 14, Title 51, Code of Alabama 1940, certain sections of which were amended by Act No. 564, Approved July 10, 1943 and Act No. 366, Approved July 5, 1945, provide certain business or occupational license exemptions to veterans. Act. No. 661, approved September 4, 1951 is an act 'To define, regulate and license barbers and barber colleges, and other like businesses in counties of the State of

Alabama having a population of four hundred thousand or over, according to the last or any subsequent Federal Census; to create a barber's Commission for said counties and define the powers and duties of said barber's Commission; and to provide for an inspector, and to provide a penalty for the violation of the provisions hereof.'

"In Section 5 of said Act No. 661 appears the following sentence:

"There shall be no exemptions from the payment of these licenses by any barber, scalp specialist, barber apprentice, barber teacher, barber school, barber shop operator, partnership, association or corporation; or school board or public institution where a fee is charged for barbering.'

"We desire your opinion as to whether or not said provision precludes the granting of exemptions to veterans on licenses required by Section 5 of Act 661 for the practice of the occupations or professions therein stated.

"Incidentally, we wish to call to your attention that veterans license exemptions are granted on license fees required to be paid for the practice of law and other professions."

It is my opinion that your question must be answered in the affirmative.

Act No. 353, General Acts 1945, page 570, as amended, in part, by Act No. 698, General Acts 1947, page 535, exempts bona fide permanent residents of Alabama, who have served 90 days or more in the armed forces of the United States, between September 16, 1940, and the termination of World War II by the signing of a definitive treaty of peace, from the payment of certain State, county, and municipal business and occupational license taxes.

Title 51, Sections 852-864, Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562, and by Act No. 366, General Acts 1945, page 589, provide for certain similar exemptions for disabled veterans who meet the qualifications set out therein.

Act No. 661, General and Local Acts 1951, page 1125, is a regulatory act, applicable to Jefferson County only, which defines, regulates, and licenses barbers and barber colleges; provides for an inspector; and contains a penalty for the violation of the provisions thereof. Section 5 of the act provides, in part, as follows:

"There shall be no exemptions from the payment of these licenses by any barber, scalp specialist, barber apprentice, barber teacher, barber school, barber shop operator, partnership, association or corporation; or school board or public institution where a fee is charged for barbering."

The clear purpose and intent of Act No. 661, supra, is to regulate and supervise the operations and activities of barbers and barber colleges, and to safeguard their public clientele from unhealthful and unsanitary conditions which might exist in the absence of regulation and inspection.

The quota part of Section 5, supra, expressly states that there shall be no exemptions from the licensing provisions of the act. Unhealthful and unsanitary conditions might arise as quickly in a barber shop or college operated by veterans as in a barber shop or college operated by non-veterans. It is my opinion that the express provisions of Section 5, supra, control over the general laws exempting veterans from the payment of certain State, county, and municipal business and occupational license taxes; therefore veterans are not exempt from the licensing provisions of Act No. 661, supra.

Very truly yours,

SI GARRETT

Attorney General

July 30, 1952

Hon. W. G. Pruett, Director
State Highway Department
Montgomery, Alabama

Counties — Right-of-Ways — Highways — Public Utilities.

Where a private easement, upon which telephone poles have been placed, has been acquired by a county by condemnation or by purchase, the county is liable for the cost of removing and relocating the poles, and the measure of damages due the holder of the easement is the cost of relocating the poles.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of March 5, 1952, is as follows:

"Re: SACP 7175-A
Russell County

"A contract has been awarded for the construction of the above numbered road project, located in Russell County, beginning at end of

pavement south of Fort Mitchell, and extending approximately five miles southerly along the River Road. For practically the entire length, there is a toll line of the Southern Bell Telephone and Telegraph Company, the poles of which are just clear of the existing road. The widening which is involved in the road contract, makes it necessary to remove and reset most of these poles. The contractor is ready to begin work, but cannot do so until the poles are moved.

"Russell County Commission contends that the Telephone Company occupies a space for which they have no recorded title, easement, or permit, on land which the County has obtained by deed or easement from abutting property owners, including an easement from the military reservation of Fort Benning. Under these conditions the county contends that the Telephone Company should move their poles without cost to the county. The Telephone Company maintains that their line was erected in the period 1904 to 1907, and has occupied the same location since that time without contest, and hence has title by adverse possession.

"The contract for the road is a part of the State aid program, under authority of the 'Farm to Market Road Act of 1943,' and under such authority the Highway Department bears 50% of the cost of construction. Such being the case, I request your opinion on this matter. The practical point at issue is, whether the Telephone Company or the County and State jointly, shall bear the cost of the removal and adjustment of the telephone line.

"I am enclosing a certified photostatic copy of a letter from the Telephone Company's attorney, Mr. Rexford L. Hawkins, in which he states and defends the position taken by the Company. I am also enclosing a letter from the County Commission, attaching a photostatic copy of an easement from Fort Benning Military Reservation for right of way on a portion of the road project approximately 1.5 miles in length.

"Your early consideration and statement of opinion in this matter will be appreciated as construction of the road project is being delayed until a decision can be reached."

It is my opinion that Russell County will be liable for the cost of relocating the poles of Southern Bell Telephone and Telegraph Company insofar as they interfere with project SACP 7175-A. According to your request, the poles of the telephone company were placed in their present location in the years between 1904 and 1907, prior to the acquisition of the rights-of-way by Russell County. The poles were not placed on the right-of-way of the county or the State, but were placed on private property and U. S. Government property. As will readily be seen, the poles have been in their present location for the last forty-five years. Assuming, without deciding, that the telephone company has held openly, notoriously, and adversely to

the private owners for that length of time, it has acquired an easement over private property by prescription. *Ford v. Bradford*, 218 Ala. 62, 117 So. 429. Of course adverse possession does not run against the Federal Government. However, it has been held that where a railroad company, having the power of eminent domain, enters the actual possession of land necessary for its corporate powers, with or without the consent of the owner for constructing its line, a subsequent purchaser of the land takes it, subject to the burden of the railroad, and has no right of action against the company unless such right is expressly conveyed in the transfer. *Green v. South-Bound R. Company*, 112 Ga. 849, 38 S. E. 81. This rule has been followed in a number of cases and has been held to apply to power companies. *Georgia Power Company v. Kelly*, 182 Ga. 33, 184 S. E. 861. The only conveyance furnished me is that conveying an easement over part of the Ft. Benning Military Reservation. Nothing in that deed conveys a right of action against the telephone company.

Based upon the above authorities, it is my opinion that the Southern Bell Telephone and Telegraph Company has acquired an easement over the land in question.

As to the appropriation of a private easement to a public use, the following statement is found in 28 C. J. S., Easements, Section 64, page 731:

"An easement will be extinguished by a lawful appropriation to a public use of the land where the easement is located or of other land which will render enjoyment of the easement impossible. . . . the owner of the easement is entitled to recover the damages sustained by reason of the appropriation to public use of the land subject to the easement."

Easements may be condemned under the authority to condemn land or real estate. See 29 C. J. S., Eminent Domain, Section 69, page 858.

In the case of *Los Angeles County v. Wright*, 236 P. 2d 892, at page 897, the California Court held as follows:

"An easement over land is real property and the holder of such easement is entitled to recover damages when such easement is taken or damaged for public use."

See also *Rose v. State of California*, 123 P. 2d 505.

It is my opinion that Russell County, in acquiring its right-of-way, also acquired the easement held by the telephone company insofar as that easement interferes with the project. The telephone company must be justly compensated for the loss of its easement. Quarterly Report of Attorney General, Vol. 15, page 130. In *Los Angeles County v. Wright*, supra, it was determined by the court that the measure of damages for the taking of the

easement held by a gas company would be the cost of relocating the pipeline.

Section 10 of Act No. 329, General Acts 1943, page 311, requires that rights-of-way for "farm to market roads" should be secured by the county at its own expense, and the cost should not be considered as a part of the cost of construction. It is, therefore, my opinion that Russell County must pay the cost of relocating the poles of the Southern Bell Telephone and Telegraph Company insofar as those poles interfere with Project SACP 7175-A.

Sincerely yours,

SI GARRETT

Attorney General

July 30, 1952

Hon. Elton G. Collins

Tax Assessor

Houston County

Dothan, Alabama

Taxation — Exemptions — Ad Valorem Taxes.

Exemption from ad valorem taxation of plants, industries, and factories under the provisions of Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460, remains in effect for the period granted, even though, prior to the termination of the exemption period, a corporation other than the original one owns and operates the plant, industry, or factory, so long as it continues to be operated for the purpose for which it was constructed.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of March 21, 1951, is as follows:

"The City of Dothan and the Board of Revenue of Houston County granted a five year exemption from taxes to Indian River Textile Company, September, 1946, according to Section 3 and 4 of Title 51, Code of Alabama 1940. In July, 1950, following the expiration of four years

of exemption, the Company name was changed to Ainsbrooke, Inc. Both the City Commission of the City of Dothan and the Board of Revenue of Houston County have indicated by resolution that the tax exemption should be transferred to Ainsbrooke, Inc. for the remainder of the five year exemption term, which would expire September, 1951.

"The change in the Company name came about due to the death of the principal owner of Indian River Textile Company and its holding Company, the Campe Corporation. The same management operates the present Company as did the Indian River Textile Company. The President of Ainsbrooke, Inc., the new Company, is Morton Flamberg, who was the person who initiated the negotiation with Dothan to locate the Plant here in Dothan April, 1946.

"I would like this exemption to continue provided if, in your opinion, the law permits it. I would appreciate your advice in order that we might act accordingly to keep a moral obligation to the management of this Company."

Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1951, page 460, provides insofar as here pertinent as follows:

"For the purpose of encouraging the building, extending and operation of plants, industries and factories in this state. . . , the court of county commissioners, or other court or board having like jurisdiction of any county, and the constituted authorities of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants, are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for any schools and school district purposes, on such plants, industries or factories and on all extensions or additions to such plants, industries or factories as are already built and operating, and on all plants, works, machinery and other equipment of such plants, industries or factories, or additions thereto, or extensions thereof, and also on all of the capital stock of such plants, industries and factories, or increase of such capital stock made for the purpose of making the additions thereto or extensions thereof, for a period of not exceeding ten years from the date of the incorporation or organization of such plants, industries or factories, if incorporated and organized under the laws of the State of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the State of Alabama, if a foreign corporation, or from the date of completion of such plant, industry or factory, or from the date of the completion of such addition or extension thereof. Provided, however, that the period of the foregoing exemptions shall not be extended, renewed or in any way added thereto, because of any reincorporation, or reorganization of the original corporation, or the sale of the assets to a different person, firm or corporation. Provided nothing herein shall authorize the exemption of the land on which such plants, industries or factories are located or proposed to be located." (Emphasis added)

It is to be noted from the above-quoted provisions of Section 3, as amended, *supra*, that the exemption is applicable to taxes assessable on plants, industries, and factories, and extensions thereof or additions thereto, including all works, machinery, and other equipment of such plants, industries, or factories. It is the specified property which is exempt from taxation. Of course, an exemption so granted is granted in the name of the corporation owning and operating such plant, industry, or factory; and the period of exemption commences from the date of incorporation or organization, if a domestic corporation, or from the date of being granted permission, to do business in this state, if a foreign corporation, or from the date of completion of such plant, industry, or factory or addition or extension thereof. However, it is my opinion that the exemption does not cease merely because of the change of the corporate name of the corporation owning and operating such plant, industry, or factory. Section 3, as amended, *supra*, provides that reincorporation or reorganization may not **extend, renew, or add** to the period of exemption granted, but such reincorporation or reorganization does not **shorten** the period of exemption so long as the same sort of plant, industry, or factory which was originally qualified for exemption under said section is operated.

Title 51, Section 5, Code of Alabama 1940, prescribes the circumstances under which the exemption ceases short of the expiration of the period of exemption granted. Section 5, *supra*, provides as follows:

“§ 5. WHEN SUCH EXEMPTION CEASES.—The exemption granted to any factory or plant becoming entitled to its enjoyment, and as to the capital stock thereof, shall cease whenever the operation of such factory or plant for the purpose of its construction shall be abandoned. Provided that where such plant is not operated for a consecutive period of twelve months, such fact shall be *prima facie* evidence of such abandonment.”

This statute merely provides that the exemption ceases “whenever the operation of such factory or plant for the purpose of its construction shall be abandoned.” This seems to indicate that the exemption continues for the period granted even though, prior to the termination of the exemption period, a corporation other than the original one owns and operates the plant, industry, or factory so long as it continues to be operated for the purpose of its construction as specified in Section 3, as amended, *supra*. It is the property which is exempt, not the owner of the plant, industry, or factory. Of course, it is the owner who derives the benefit from the exemption, but *ad valorem* taxation or the exemption therefrom follows the property regardless of the owner thereof. Taxes assessed against property create a personal liability of the owner and are a lien against the property duly assessed. *Wiggins Estate Co., Inc., et al. v. Jeffery et al.*, 246 Ala. 183, 19 So. 2d 769. If the property is exempt from taxation, no personal liability arises nor is there a lien against such property.

It is, therefore, my opinion, under the facts as stated, that the change of the corporate name from Indian River Textile Company to Ainsbrooke, Inc., would not effect a termination of the five-year period of exemption at the end of the fourth year, and the exemption for the fifth year is still effective. This conclusion is, of course, based on the assumption that the plant, industry, or factory is still being operated for the purpose for which it was constructed and for which the exemption was granted.

Your very truly,

SI GARRETT

Attorney General

July 30, 1952

Hon. J. P. Shaffer, Clerk

Board of Revenue

Montgomery County

Montgomery 4, Alabama

Counties — Contracts — Montgomery County.

The governing body of Montgomery County may contract with the Montgomery Humane Society, Inc., to maintain a dog pound, which the county is required to provide under the provisions of Title 22, Section 112, Code of Alabama 1940, as amended by Act No. 195, General Acts 1945, page 320, and may appropriate funds for such purpose.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of July 17, 1952, is as follows:

"I have been directed by the Board of Revenue to have prepared, a request and submit it to you of the following question:

'May the Board of Revenue contract with the Montgomery Humane Society, Inc., a non profit organization, relative to carrying out the duties of the County required by the law in establishing a dog pound?'

"In other words, the statute requires the City and County of Montgomery to have a dog pound. The City and County are desirous of carrying out this obligation and are cognizant that the Montgomery Humane Society, Inc., possesses the necessary and proper facilities for this work and no doubt is in a position to properly lend valuable services in this project.

"It is believed that if a contract is made with this organization for such services as required by the law, it would be a material saving in taxes to the people of the City and County of Montgomery. The County is desirous of entering into such a contract to such an extent that it may do so within its financial ability consistent with its other duties, but wants to know if they may enter such a contract legally.

"The contract, of course, will have clauses in there making it obligatory upon the Montgomery Humane Society, Inc., to fulfill their duties for a dog pound as required by statute requiring the County to have a dog pound.

"No doubt you are familiar with the law but for your convenience, the following Code Sections are relevant:

Title 22, Section 112, et. seq.

Title 22, Section 105, et. seq.

Title 22, Section 116

Title 12, Section 12, sub-paragraph 19

Title 37, Section 485

Title 62, Section 107, et. seq.

all of the Code of Alabama as amended. Your usual prompt attention will be appreciated."

Title 22, Section 112, Code of Alabama 1940, as amended by Act No. 195, General Acts 1945, page 320, provides as follows:

"Impounding of unlicensed dogs.—It shall be the duty of each and every county in the state, and of every municipality over five thousand in which the county pound is not located, to provide a suitable enclosure for the impounding of all dogs found running at large in violation of the provisions of this chapter, and to maintain them while confined therein. Where dogs are impounded, the rabies inspector shall, in some form of manner, give a notice of not less than seven days; and, if the owner thereof is known, such owner shall be given direct notice of the impounding of a dog or dogs belonging to him."

It will be noted that no particular method is prescribed by which the county must provide a dog pound. It is my opinion that the county may

contract with the Montgomery Humane Society, Inc., a nonprofit organization, to provide the dog pound required by Section 112, as amended, *supra*, and may appropriate funds to that end if the said Humane Society is properly equipped to carry out the necessary work. Such contract should require that the Montgomery Humane Society, Inc., fulfill all the duties required by law in the maintenance and operation of a county dog pound. I see no reason why Montgomery County should be put to the expense of constructing a separate dog pound when adequate facilities may be utilized on a contract basis.

Very truly yours,

SI GARRETT

Attorney General

July 30, 1952

Hon. Lawrence A. May

First Assistant

State Service Commissioner

Department of Veterans' Affairs

P. O. Box 1509

Montgomery 2, Alabama

Colleges and Universities — Veterans — Words and Phrases.

The word "child" as used in Act No. 47, General and Local Acts 1951, page 259, granting educational benefits to the children of certain veterans, includes stepchild.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of July 20, 1951 is as follows:

"This Department would appreciate your opinion on the following.

"Act No. 47, approved May 24, 1951, which supersedes the provisions of Act No. 633, approved September 19, 1949 and Act No. 44, approved October 31, 1950, provides certain State educational benefits to any child of certain disabled veterans or deceased servicemen or veterans. The Act does not elaborate on the meaning of the word 'child.' Will

you please give us your opinion as to whether or not the term 'child,' for this purpose, includes a stepchild if a minor and a member of the household of the disabled veteran or deceased serviceman or veteran.

"(We realize that Federal laws or regulations would not have any legal effect upon Alabama law in this regard but, for your information, Section 7 of Public Law 144, 78th Congress, on the subject of compensation or pension paid by the United States Veterans Administration, provides that the term 'child' shall include a stepchild if unmarried and under 18 years of age and a member of the veteran's household.)"

The word "child" as used in Act No. 47, General and Local Acts of 1951, page 259, includes a minor stepchild who is a member of a veteran's household. This act allows a "child" of a veteran killed or disabled as a result of service in the Armed Forces of the United States, during the periods and under the conditions specified in Section 1 of the Act, attendance in certain State educational institutions without payment of tuition or fees. Clearly, the benefits of this act are designed to compensate in some way for the decease or disability of the veteran, with the idea that the educational opportunities made available under this act would have been furnished the "child" by a disabled veteran or by a deceased veteran if he had been living. While the financial benefits under this act are not, strictly speaking, contributions for maintenance or support of a deceased or disabled veteran's family, they are closely akin to such payments, if not to some extent in lieu of such payments. Thus, the beneficent purpose of this act requires broad construction of the word "child," as is the case with other support and maintenance statutes.

While it is true that the Alabama Workmen's Compensation statute specifically includes "stepchildren, who were members of the family of the deceased, at the time of the accident, and dependent upon him for support," in the definition of "child" or "children" (Title 26, Section 262(b), Code of Alabama 1940, as amended by Act No. 36, General and Local Acts 1949, page 47), courts of other states have applied a broad construction to these words in the absence of statutory definition. See, *Newark Paving Company v. Klotz*, 85 N. J. L. 432, 91 A. 91 (stating that "children" includes dependent stepchildren supported by the deceased), and *Duluth-Superior Milling Company v. Industrial Commission*, 226 Wisc. 187, 275 N. W. 515 (containing a similar construction). See also, *Traveler's Insurance Company v. E. I. DuPont de Nemours and Company* (Del.), 9 A. 2d. 88, 91.

Another persuasive source of authority appears in the regulations adopted by the Federal Government to supplement Federal Veterans Benefit Laws. See Veterans Regulation No. 10(a), Par. VI, as amended July 13, 1943, Chapter 233, Section 7, 57 Stat. 555, which states that the term "child" shall include a "stepchild if a member of the man's household." This regulation implements benefits included in Title 38, U. S. C. A., Sections 700, et seq. While the Federal interpretation of the word "children" is not, of course, conclusive when interpreting our own statute, nevertheless, since

the Alabama legislation is similar in purpose and scope, the Federal definition is persuasive. Absent contrary authority, it is adopted.

In conclusion, the word "child" in the instant act included a stepchild when that child is a minor and a member of the household of the disabled or deceased serviceman or veteran.

Yours very truly,

SI GARRETT

Attorney General

July 31, 1952

Hon. W. E. Farrar, Mayor

Town of Reform

Pickens County

Reform, Alabama

Counties — Funds — Appropriations — Municipalities.

A county governing body may appropriate funds to a municipality within the county for the purpose of extending the water and sewage system of the municipality when both the county and municipality benefit therefrom.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of October 19, 1951, is as follows:

"I am running into some difficulties in securing enough money to put the water and sewage system from Reform to the Westinghouse Electric Corporation's plant site. The question that I would like to have you give me an opinion on is, CAN THE COUNTY GOVERNING BODY APPROPRIATE FUNDS TO A MUNICIPALITY, So that the above project can be completed? Your reply to this letter will be greatly appreciated at your earliest convenience."

The answer to your inquiry should be in the affirmative.

Your attention is invited to an opinion of this office in Quarterly Report of Attorney General, Vol. 47, page 63. In this opinion it is stated that

governmental subdivisions have authority to give financial aid, one to the other, for the purpose of acquiring or constructing a waterworks system for the benefit of both.

Title 37, Section 308, Code of Alabama 1940, authorizes any county, city, or incorporated town of the State to acquire a waterworks system and a sanitary sewer system, or to improve, enlarge, extend or repair the same, to furnish the services, commodities, and facilities of such systems to domestic or industrial users.

In Quarterly Report of Attorney General, Vol. 47, page 63, *supra*, it was held that by virtue of Title 37, Sections 308-340, Code of Alabama 1940, either the county or the town has authority to grant financial aid to the other out of monies in its general fund, not otherwise appropriated to acquire or construct a waterworks system to serve both the county and the town.

Constitution of Alabama 1901, Section 94, does not restrict the type of appropriation here under consideration. The Supreme Court of this State, in the case of *State ex rel Austin v. City of Mobile*, 248 Ala. 467, 28 So. 2d 177, held that the City of Mobile could give financial aid to the State in the expansion of the Alabama State Docks and Terminals in the City of Mobile. In this case the city made a grant or donation in consideration of the benefits it would derive. The court, speaking through Justice Stakely, stated that Section 94 of the Constitution of 1901 has reference only to private associations and corporations.

In the case of *Carey v. City of Haleyville*, 230 Ala. 401, 160 So. 496, suit was brought to enjoin the city from paying to the county board of education a part of the cost of constructing a school building located in the city. The court in this case held such a payment or contribution valid.

It is, therefore, my opinion that a county may contribute funds to a municipality within the county to aid in the extension of the water and sewage systems of said municipality, where both the county and municipality receive a benefit therefrom.

Of course, the water and sewer system so constructed will be available for use by the public generally both for domestic and industrial purposes, and will not be for the exclusive use of one plant only.

Your very truly,

SI GARRETT

Attorney General

July 31, 1952

Hon. Bert E. Thomas

Tax Assessor

Mobile County

Mobile, Alabama

Ad Valorem Taxes — Exemption.

Oyster shells in their natural state are raw materials within the meaning of the provisions of Title 51, Section 2(1), Code of Alabama 1940, as amended by Act. No. 953, General and Local Acts 1951, page 1626, and as such are exempt from ad valorem taxation when produced during the current calendar year and stocked at any plant or furnace for manufacturing Portland cement.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of January 9, 1952, is as follows:

"Sentence 'L' of Paragraph 2 of the 1940 Code of Alabama, as amended provides that, 'All raw material, including coke, produced during the current calendar year, when stocked at any plant or furnace, for manufacturing purposes in Alabama,' shall be exempt from ad valorem taxation.

"In Mobile County there is a large manufacturer of Portland cement which uses as its chief raw material for the making of said cement, oyster shells dredged from nearby waters. Please advise if in this instance oyster shells can be classified as raw material and not subject to ad valorem taxation."

Title 51, Section 2(1), Code of Alabama 1940, as amended by Act No. 953, General and Local Acts 1951, page 1626, provides, in part, as follows:

"§ 2. The following property and persons shall be exempt from ad valorem taxation and none other. . . . (1) All raw material, including coke, produced during the current calendar year, when stocked at any plant or furnace, for manufacturing purposes in Alabama . . ."

It is well settled that an exemption must be strictly construed in favor of the taxing authority, and that a person claiming an exemption has the burden of proving his right thereto. Title *Guarantee Loan & Trust Co. v. Hamilton*, 238 Ala. 602, 193 So. 107; *Pullman-Standard Car Mfg. Co. v. State*,

253 Ala. 638, 46 So. 2d 500. A taxpayer to come within the foregoing exemption would have the burden of showing that the material in question is "raw material" within the meaning of the statute, that the raw material was produced during the current calendar year, and that the raw material was stocked at a plant or furnace for manufacturing purposes in Alabama.

From the facts as stated, it is apparent that the oyster shells stocked are in their natural state. In the Biennial Report of the Attorney General 1936-38, page 712, the following definition of "raw material" as used in Section 2(1), *supra*, is given:

"In my opinion, the term 'raw material' as used in the exemption, *supra*, means material which has not been changed by some process of treatment or fabrication, or material in its natural state. Any other construction would be placing a broader interpretation on the exemption in the statute than the statute itself."

Black's Law Dictionary defines "raw material" as follows:

"Raw material. 'Raw material,' as used in definition of 'manufacture,' denotes merely material from which final product is made, not necessarily in its natural state. *State v. Henessy Co.* 71 Mont. 301, 230 P. 64, 65; *City of Henderson v. George Delkes Co.*, 193 Ky. 248, 235 S.W. 732, 735."

Webster's New International Dictionary (Second Edition) defines "raw material" as follows:

"Raw material—Material available as suitable for manufacture, etc., but still raw."

"Raw . . . 2. In, or nearly in its natural state, little changed by art; unwrought . . . g. not yet prepared by heat."

Portland cement is a widely used hydraulic cement made by burning and grinding a carefully proportioned artificial mixture of limestone or some other aluminous material such as chalk, limestone, marl, or slate. It "is the slowsetting product of a high-temperature kiln burning, a pulverized cement rock, or a mixture of clay and limestone of a very exact and regular composition." *Trinity Portland Cement Co. v. State*, 144 S.W. 2d 329, 332 (Texas). Limestone is sometimes formed by chemical precipitation but it is more often formed by the accumulation of organic remains such as shells and corals. Webster's New International Dictionary (Second Edition). The name is derived from the resemblance of concrete made with it to Portland stone which is obtained from the Isle of Portland in England. Webster's New International Dictionary (Second Edition); *Lone Star Cement Corporation v. State Tax Commission*, 234 Ala. 465, 175 So. 399.

In view of the foregoing , it is my opinion that the oyster shells are "raw material" within the meaning of the provisions of Section 2(1), as amended, supra, and, as such, are not subject to ad valorem taxation provided the taxpayer can show the other elements required by the statute.

Yours very truly,

SI GARRETT

Attorney General

July 31, 1952

Hon. R. P. Allen, Jr., President

Marengo County Board of Revenue

Linden, Alabama

Counties — Marengo County — Statutes.

The President and Members of the Board of Revenue of Marengo County are entitled to be paid \$110.00 per month each for discharging their ex officio duties as chief forest warden and district forest wardens, in addition to their regular compensation of \$10. per day for their services rendered as members of the county governing body.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of July 17, 1952, is as follows:

"Your opinion is respectfully requested on the following matter.

"The present original law relative to the establishment of the Board of Revenue of Marengo County is found in Alabama Local Acts, 1923, page 188. This Act was amended by Alabama Local Acts, page 147, 1927, Section 3 of which reads as follows:

"Sec. 3. That Section 11 of said Act be, and the same hereby is, amended so as to read as follows: Section 11. That the members of said Board of Revenue shall each be entitled to Ten Dollars per day for each day of actual service rendered; five cents per mile for traveling to and from the sittings of said Board of Revenue, and to and from the

place where any service is rendered by them, to be paid out of the County Treasury on certificates or warrants signed by the president, or president pro tem, of the Board of Revenue; provided that no member of the Board of Revenue shall, during any year, receive more than Eight Hundred Dollars from the County Treasury for any and all services rendered by him either as a member of the Board or for any work or labor done for, or services rendered to the County.'

"Alabama Acts of 1949, page 655, reads as follows: (Omitting the subject)

"'Section 1. Marengo County is hereby divided into four forest-protection districts, the boundaries of each of which shall coincide with the four districts from which Members of the Board of Revenue are elected. There shall be a chief forest warden for the County who shall have the duty of requiring and supervising the enforcement of the provisions of Chapter 4, of Title 8 of the Code of Alabama (1940) in regard to the entire county. In addition, there shall be four district forest wardens, each of whom shall have the special duty of investigating and reporting, for his district, violations of Chapter 4 of Title 8 of the Code of Alabama (1940).

"'Section 2. The President of the Board of Revenue of Marengo County shall be ex officio chief forest warden for the county and the several members of the Board of Revenue of Marengo County shall be, ex officio, district forest wardens for their respective districts. For the performance of their duties as such, each shall be paid a salary of one hundred ten dollars (110) per month out of any funds in the county treasury not otherwise appropriated.

"'Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

"'Approved August 23, 1949.

"'Time 11:46 A.M.'

"Due to the conflict in the above quoted Acts, a question has arisen as to whether or not the Members of the Board of Revenue and the President, are entitled to receive \$800.00 per year plus the additional \$110.00 per month provided for in the 1949 Act."

In my opinion, your question should be answered in the affirmative.

Act No. 311, Local Acts 1923, page 188, created the Board of Revenue of Marengo County, said board to consist of four persons and the president, and the county to be divided into four Board of Revenue Districts. Compensation of the members of the said board was fixed by Section 11 of the act at Five Dollars per day for each day of actual service rendered, and five cents per mile for travel while discharging their official duties.

The total amount which any member of the board might receive during any one year was fixed at \$400.00.

Section 11, *supra*, was on August 11, 1927, amended by Act No. 242, page 147. The amendment increased the compensation to ten dollars per day, the mileage allowance remaining fixed at five cents per mile. The total amount, which any single member of the board could receive during any one year, for any and all services rendered by him either as a member of the board or for any work or labor done for or services rendered to the County, was increased to \$800.00.

Act No. 451, General and Local Acts 1949, page 655, divides Marengo county into four forest-protection districts coinciding with the four Board of Revenue Districts, and imposes upon the president and four members of the said board the additional *ex officio* duties of chief forest warden and District forest wardens. For the performance of such additional duties, Act. No. 451, *supra*, provides that each of the five members of the Board of Revenue shall receive from the County additional compensation in the amount of \$110.00 per month.

Act. No. 451, *supra*, was approved on August 23, 1949, and became law prior to the recently ratified amendment to the Constitution of Alabama 1901, prohibiting an increase in the compensation of State and County officers during the term for which they were elected or appointed by the imposition of new, different, and additional duties. See Section 281, Constitution of Alabama 1901; Act No. 748, General and Local Acts 1951, page 1297.

Act. No. 451, *supra*, does not refer to Acts Nos. 311 and 242, *supra*, and does not contain a repealing clause. However, the apparent conflict is resolved by the well-settled principle of statutory construction that the last expression of the legislative will is the law in case of conflicting provisions of statutes on the same subject, and the last enacted in point of time prevails. *Middleton v. General Water Works & Electric Corporation*, 25 Ala. App. 455, 149 So. 351 (cert. den. 227 Ala. 219, 149 So. 352).

In this connection, your attention is also called to the following principle of statutory construction:

"Thus, legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, the rules of statutory construction, and the judicial decisions and that of a change occurs in legislative language a change was intended in legislative result." 2 *Sutherland on Statutory Construction*, Section 4510, page 327, et seq. (3rd ed.—1943).

Very truly yours,

SI GARRETT

Attorney General

August 1, 1952

Hon. Earl M. McGowin

Director of Conservation

C A P I T O L

Game and Fish — Justices of the Peace.

The provisions of Title 13, Section 424, Code of Alabama 1940, do not apply in a prosecution for violation of the game and fish laws before a justice of the peace or other inferior court.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of April 2, 1952, is as follows:

"An official opinion was rendered by the Attorney General on November 12, 1941 which is cited in the Attorney General's Reports, October-December, 1941, page 137, to the effect that when a criminal case is brought before a justice of the peace of which he has jurisdiction, and the defendant demands a trial by jury under Code 1940, Title 13, Section 424, and presents to the court a proper bond, the case automatically goes into the Circuit Court and any further order made by the justice of the peace is without authority of law and void.

"Under Section 47, Title 8 of the 1940 Code, justices of the peace or the inferior criminal courts of Alabama are given final jurisdiction to try and convict persons, firms or corporations violating any of the provisions of the game and fish laws or the rules and regulations promulgated thereunder.

"On frequent occasions a person charged with a violation of the game laws and regulations will demand a trial by jury under Section 424 of Title 13. We have always maintained, however, that Section 47 of Title 8 controlled the jurisdiction of the justice of the peace so far as game and fish laws and regulations are concerned. We further believe that under Section 47 of Title 8 a person charged with such a violation would only have the right to a trial by jury by appealing from the justice of the peace or other inferior court.

"I should like to have your official interpretation of Section 47, Title 8 as compared with Section 424, Title 13, so far as game and fish violations are concerned, so that confusions and misinterpretations of these two sections may be eliminated in the future."

Your question is specifically answered in Title 8, Section 56, Code of Alabama 1940, where it is provided in part as follows:

"In any prosecution for misdemeanor before a justice of the peace or other inferior court, under and by virtue of the provisions of the game and fish laws, the defendant shall not have the right of a jury trial, except on appeal to the circuit court or court of like jurisdiction, but the said justice of the peace or other inferior court having jurisdiction shall proceed with the trial, and if the defendant is convicted he may appeal to the circuit court or other court of record of like jurisdiction"

It is, therefore, my opinion that the provisions of Title 13, Section 424, Code of Alabama 1940, do not apply to prosecutions before a justice of the peace or other inferior court for violations of the game and fish laws of Alabama.

Sincerely yours,

SI GARRETT

Attorney General

August 6, 1952

Hon. A. B. Jefferies, Chairman

Board of Revenue & Road Commissioners

Mobile County

Mobile, Alabama

Elections — Absentee Ballots — Registers.

1. A register of the circuit court, or person acting in his stead, is entitled to receive compensation for handling absentee ballots, under the provisions of Section 17, Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570, in respect to each separate election held on the same day.
2. Even though the register of the circuit court is on a salary basis, he is entitled to receive compensation for handling absentee ballots.
3. The provision in Section 17, as amended, *supra*, that "no municipal officer or regular employee shall be compensated

for his service in this regard," does not refer to a register who is appointed by the presiding judge and receives a salary.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 15, 1952, is as follows:

"Your official opinion is respectfully requested on the following important question, viz:

"Hon. James A. Crane, Register of the Circuit Court of Mobile County, Alabama, has filed with this Board his claim for \$630.00 in connection with performing the duties required of him under Section 17 of the Act approved August 19, 1949, and amended by Act. No. 921 approved September 12, 1951 (General Acts 1951, Volume 2, pages 1570-1), the services of said Register involving the handling of the absentee ballots for the Primary Election held on May 6, 1952, the Constitutional Amendment election held on the same date and the election called by the Board of Revenue and Road Commissioners of Mobile County, Alabama, held on the same date on the question of extending the Mobile County School tax.

"I distinctly recall that your office ruled heretofore on the 1949 Act above referred to that, where the Register performed such services for different elections such as those to which I have referred, which were however held on the same date, that he was entitled to the compensation fixed by said 1949 Act for each of said separate elections. However, this letter is prompted by virtue of the amendment by the 1951 Legislature of Section 17 of the 1949 Act, which 1951 Act added a provision to the effect that no municipal officer or regular employee shall be compensated for his services in this regard.

"Does or has the 1951 Act affected the compensation of the Register in this regard? In other words, is it not the duty of this Board even under the amended Act to allow and pay this claim of the Hon. James A. Crane, Register of the Circuit Court of Mobile County, Alabama, even though he is a salaried officer appointed by the presiding Judge of the Circuit Court of Mobile County, Alabama."

In my opinion, your inquiry should be answered in the affirmative, that is to say, that it is the duty of the county governing body of Mobile County to allow and pay the claim of the register of the circuit court for each of the three separate elections in which he handled absentee ballots, under the provisions of Section 17 of Act No. 424, General and Local Acts 1949, page 601, as amended by Act No. 921, General and Local Acts 1951, page 1570.

As stated in your inquiry, this office has held, in an opinion under date of November 7, 1951, addressed to Hon. John A. Williams, Circuit Clerk and Register, Chambers County (Ms.), that when two elections are held on the same day (other than municipal elections held at a time different from primary or general elections), the register, or person acting in his stead, is entitled to the compensation provided by Section 17, as amended, *supra*, for his services in handling absentee ballots for each of the two elections. This opinion is based upon the fact that separate services must be performed by the register, or person acting in his stead, in respect to each of the elections. You will note that this opinion was rendered on November 7, 1951, after the amendment to Section 17, *supra* (Act No. 921, *supra*, approved September 12, 1951).

Furthermore, this office has also held that even though the register is on a salary basis, the register is entitled to receive personally the fees prescribed by said Section 17, as amended, *supra*. Quarterly Report of Attorney General, Vol. 59, page 29.

In my opinion, the sentence, "Provided, no municipal officer or regular employee shall be compensated for his services in this regard," as in Act No. 921, *supra*, does not refer to a register who is appointed by the presiding judge and receives a salary.

I see no reason, therefore, why the Register of Mobile County is not entitled to receive the compensation provided by Section 17, as amended, *supra*, for his services in handling the absentee ballots for each of the three elections, although said elections were held on the same day.

Yours very truly,

SI GARRETT

Attorney General

August 11, 1952

Hon. Edgar Underwood

Judge of Probate

Franklin County

Russellville, Alabama

Franklin County — Sheriffs — Counties — Constitutionality.

1. When the salary of a county officer is fixed by law and the claim is valid, such claim is not required to be audited and allowed by the county governing body.

2. The residence and territorial assignment of an additional deputy sheriff, appointed by the sheriff under the provisions of Act No. 201, General and Local Acts 1951, page 462, are in the first instance decided by the appointing sheriff, but the court of county commissioners may refuse to appropriate an amount for the salary of said additional deputy if his residence and assignment are not in substantial compliance with Act No. 201, *supra*.

3. The budget adopted by a county may be amended and revised at any time.

4. A local act creating an additional deputy sheriff and fixing his salary does not violate Sections 68, 96, 104(24), 105, and 281 of the Constitution of Alabama 1901.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion is as follows:

"Local Act of the present legislature No. 201-H. 504—Oden authorizes the Sheriff to appoint a deputy in addition to the deputies heretofore authorized by law and further provides, 'such deputy shall be a resident of and be assigned to the western part of Franklin County; he shall be paid a salary of One Hundred Seventy Five Dollars (\$175) per month. The compensation of such deputy shall be paid by the county out of any funds in the county treasury not otherwise appropriated'.

"Please advise me what are the duties of the Court of County Revenue under this act. Does the salary of such deputy have to be audited and allowed by the Court of County Revenue of Franklin County, Alabama? Does the Court of County Revenue have to ascertain whether or not such deputy resides in and is assigned to the western part of Franklin county, and if so, what is the western part of Franklin County?

"The General Fund of the county has all been appropriated for the fiscal year ending September 30, 1951 by the budget adopted at the beginning of the fiscal year. In view of this circumstance, what action can the Court of County Revenue take, if any, to provide for the payment of the salary of such deputy?

"Is said Act of the Legislature constitutional?"

The local act referred to in your inquiry is Act No. 201, General and Local Acts 1951, page 462. This act provides, in Section 1 thereof, as follows:

"The Sheriff of Franklin County is hereby authorized to appoint a deputy in addition to the deputies heretofore authorized by law. Such

deputy shall be a resident of and be assigned to the western part of Franklin County; he shall be paid a salary of one hundred seventy-five dollars (\$175) per month. The compensation of such deputy shall be paid by the county out of any funds in the county treasury not otherwise appropriated."

In my opinion, Act No. 201, *supra*, prescribes the precise amount per month to be received by the additional deputy sheriff. Since the salary is fixed by law, the county governing body is not required to audit and allow the claim each month. Title 12, Sections 33 and 114, Code of Alabama 1940; *Hasty v. Marengo County Bank*, 204 Ala. 229, 230, 86 So. 37; Quarterly Report of Attorney General, Vol. 58, page 66.

Act No. 201, *supra*, requires that the deputy shall be a resident of and be assigned to the western part of Franklin County. Since the appointment of the additional deputy is required to be made by the Sheriff of Franklin County, it is my opinion that the duty is incumbent upon the sheriff in the first instance to ascertain whether or not the additional deputy so appointed is or is not a resident of the western part of Franklin County. The appointment of an additional deputy under the provisions of Act No. 201, *supra*, by the sheriff would be presumptive of the fact that the additional deputy resided in the western part of the county, and it is the duty of the sheriff to appoint only a person who resides in said western part of the county. If the sheriff, however, appoints a person who is obviously living in the eastern part of the county, then, in my opinion, the county governing body could by resolution refuse to appropriate funds necessary to pay the salary of such deputy.

It is further my opinion that it is the duty of the sheriff to assign the additional deputy to work in the western part of Franklin County. The law requires this whether the sheriff makes a specific assignment of territory to the additional deputy or not. I do not mean by this statement that the additional deputy cannot be given duties all over Franklin county. I believe that the Legislature intended to confine the general and ordinary duties of the additional deputy sheriff to the western part of Franklin County. Unless it appears to the county governing body that the additional deputy sheriff performs more than incidental duties outside of the western part of Franklin County, the governing body would not be authorized to stop the payment of his salary.

As to what constitutes the western part of Franklin County, it is my opinion that the Legislature intended to describe that portion of Franklin County lying west of the line dividing the county in half, from north to south. Reference to a map of Alabama indicates that Franklin County is substantially rectangular. A line dividing the county from north to south and intersecting the northern and southern boundaries of the county at their respective midpoints, would, in my opinion, divide the county into an eastern and western half. The additional deputy should reside in and be assigned to said western half.

If the budget of the county does not provide an appropriation for the salary of the additional deputy sheriff, it is my opinion that the budget may at any time be revised by the county governing body in order to include an appropriation to pay the salary of said additional deputy. Biennial Report of Attorney General, 1936-38, page 42.

It is further my opinion that Act No. 201, supra, is not unconstitutional. This office has held that a similar act does not violate Section 68, 96, 104(24), 105, and 281 of the Constitution of Alabama 1901. Quarterly Report of Attorney General, Vol. 1, page 3. See also *Court of County Commissioners v. Lightner*, 225 Ala. 22, 141 So. 908.

Yours very truly,

SI GARRETT

Attorney General

August 11, 1952

Hon. L. L. Armstrong, Sheriff

Washington County

Chatom, Alabama

Sheriffs — Counties — Statutes.

1. A local act providing for the appointment of an additional deputy sheriff and authorizing the county governing body to provide funds for said deputy's salary is mandatory upon the county governing body.

2. The term "authorized," as used in ordinary language, is usually permissive, but may be mandatory when used in a statute providing for the doing of some act which is required by justice and public duty, and where the public interest is involved.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion is as follows:

"House Bill 580, Act No. 574, passed at the Regular Session of the Legislature, 1951, same being approved by the Governor on August 30, 1951, provides among other things that the County governing body is

authorized to provide sufficient funds monthly from the County Treasury for the appointment by the sheriff of an additional deputy sheriff, the salary being fixed at not less than \$200.00 per month. This act is based on population of not less than fourteen nor more than Sixteen Thousand inhabitants, which would include Washington County, Alabama.

"Please advise me if it is mandatory on the part of the County governing body to make available the monthly salary for a deputy sheriff, that may be appointed by me under the above Act? I would like to make an appointment of an additional deputy sheriff, and would like for you to give me your opinion as to whether the County under this Act must make the salary of not less than \$200.00, available for the extra deputy, whom I may appoint, and if it must be made available at once."

The local act referred to in your inquiry is Act No. 574, General and Local Acts 1951, page 1012. Section 1 of said act provides as follows:

"The governing body of any county having a population of not less than fourteen nor more than sixteen thousand inhabitants according to the last or any subsequent federal census is hereby authorized to provide sufficient funds monthly from the county treasury for the appointment by the sheriff of a deputy sheriff, such deputy to be in addition to all other deputies provided by law. The governing body of the county shall fix the deputy's salary at not less than two hundred dollars (\$200) per month, said salary to be paid from the general fund of the county."

It is my opinion that the local act, *supra*, is mandatory, in that it requires the county governing body to appropriate sufficient funds monthly from the county treasury for the payment of the additional deputy sheriff appointed by the sheriff.

It will be noted that Act No. 574, *supra*, authorizes the sheriff to appoint a deputy in addition to all other deputies. Furthermore, the governing body of the county is directed by the terms of the act to fix the deputy's salary at not less than \$200 per month. So it appears that the Legislature intended that there be an additional deputy sheriff, and intended to authorize the sheriff to appoint that additional deputy.

It is true that Section 1, *supra*, provides that the county governing body is "hereby authorized to provide sufficient funds" for the payment of the salary of the additional deputy, but this office has held that the word "authorized" as used in a similar act was mandatory upon the county governing body. Quarterly Report of Attorney General, Vol. 55, page 50. In the case of *George v. Board of Revenue and Road Commissioners of Mobile County*, 207 Ala. 227, 92 So. 269, the county governing body, under a local act, was authorized to establish fence lines between stock law districts. The local act, in describing the power of the county governing body, provided that said body would "have power and authority to define what is a lawful

fence." This phrase "have power and authority" is similar to the word "authorized." The Supreme Court of Alabama stated:

" . . . The words 'have power and authority,' used in this statute in ordinary acceptance and in private transactions usually, are construed as permissive, but their proper construction, when used in the statute, is to be determined from the consideration of the subject-matter and the relation of the provision to the general object intended to be secured by the act, so as to arrive at the true legislative intent. Mr. Black in his Interpretation of Laws lays down the rule that, where a statute provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interest or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty. . . ."

In my opinion, the main object of Act No. 574, *supra*, was to provide an additional deputy sheriff, and authorized the sheriff to make the appointment. The object of this act cannot be accomplished unless it is mandatory upon the county governing body to make an appropriation to pay the salary of said deputy. It is my opinion, therefore, that Act No. 574, is mandatory.

Yours very truly,

SI GARRETT

Attorney General

August 12, 1952

Hon. W. J. Terry

State Superintendent of Education

Montgomery, Alabama

Schools — Insurance — County Boards of Education — City
Boards of Education.

Under the provisions of Title 28, Section 317, et seq., Code of Alabama 1940, as amended by Act No. 675, General and Local Acts 1949, page 1045, it is not mandatory upon city and county boards of education to insure public school buildings and equipment, in whole or in part, through the State Insurance Fund, but such boards have the privilege of utilizing this source of insurance coverage when they desire, unless title to such buildings and equipment is vested, in whole or in part, in the State of

Alabama, or any of its agencies or institutions, or unless State funds have been used for the purchase of the land, construction of the building, or the purchase or maintenance of any equipment, furniture, fixtures, or supplies in such building, in any of which events insurance through the State Insurance Fund is mandatory.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of November 16, 1951, is as follows:

"I shall appreciate it if you will give us an opinion as to whether under Title 28, Chapter 11, Section 317, Code of Alabama of 1940, as amended, it is mandatory or merely permissive for boards of education, city and county, to carry their insurance on buildings and equipment with the State Insurance Fund."

It is my opinion that it is not mandatory that boards of education, city and county, carry insurance on school buildings and equipment with the State Insurance Fund, unless title to such buildings and equipment is vested, in whole or in part, in the State of Alabama, or any of its agencies or institutions, or unless State funds have been used for the purchase of the land, construction of the building, or the purchase or maintenance of any equipment, furniture, fixtures, or supplies in such building.

Title 28, Section 317, Code of Alabama 1940, as amended by Act No. 675, General and Local Acts 1949, page 1045, provides that:

"There shall be a fund, to be known as the state insurance fund, carried by the state treasurer for the purpose of insuring against loss by fire, lightning, windstorm, and hail, all buildings in which title in whole or in part is vested in the State of Alabama or any of its agencies or institutions, or in which funds provided by the State have been used for the purchase of the land, construction of the building, purchase or maintenance of any equipment, furniture, fixtures, or supplies in such building; and all public school buildings together with the contents of all such buildings."

Thus, it will be noted that Section 317, as amended, *supra*, authorizes and requires the insurance, by and through the State Insurance Fund, of all buildings in which title is vested, in whole or in part, in the State of Alabama, or in any of its agencies or institutions, or when State funds have been used in the purchase of the land, construction of the building, or for the purchase or maintenance of any equipment, furniture, fixtures, or supplies for such buildings. All public school buildings, together with their

contents, are, if the closing provision of Section 317, as amended, *supra*, alone be considered, included within this authorization and requirement.

Title to county school property is vested in the county board of education. Title 52, Section 71, Code of Alabama 1940. Title to city school property is vested in the city board of education. Title 52, Section 161, Code of Alabama 1940. I do not consider that title to school property, city or county, "in whole or in part is vested in the State of Alabama or any of its agencies or institutions" within the meaning of Section 317, as amended, *supra*.

Without yet considering the closing words of Section 317, as amended, *supra*, (i. e., "and all public school buildings together with the contents of all such buildings"), there is presented by this section the question whether boards of education, city and county, are "agencies or institutions" of the State of Alabama. While they have been so held for some purposes, it is my opinion that they are not agencies or institutions of the State within the meaning of Section 317, as amended, *supra*, setting up the State Insurance Fund, for the reason that, as pointed out hereinafter, Title 28, Section 320, Code of Alabama 1940, as amended by Act No. 675, *supra*, contains express and separate mention of county school buildings, and Act No. 672, General Acts 1947, page 514 (Title 28, Section 317(1), 1951 Cumulative Pocket Part, Code of Alabama 1940), contains express and separate mention of city school buildings.

Section 320, as amended, *supra*, and Act No. 672, *supra*, each uses permissive language, and neither statute states that public school buildings, city or county, shall be insured through the State Insurance Fund. Had the Legislature intended that city and county boards of education must insure only through such fund, it would have been a simple matter to have expressly so declared, but no such declaration was made. As I read them, these statutes make it possible, when so desired, for city and county boards of education to insure through such fund, but neither act imposes upon such boards the mandatory duty of insuring through this fund exclusively.

Standing alone, the closing words of Section 317, as amended, *supra*, (i. e., "and all public school buildings together with the contents of all such buildings"), would indicate a legislative intent that all public school buildings, city and county, must be insured through the State Insurance Fund. However, Section 320, as amended, *supra*, contains an express provision with reference to county schools in providing that:

"Buildings owned by any county and used for school purposes, under control of the county board of education, may be insured under the provisions of this act." (Emphasis supplied.)

Prior to the passage on September 19, 1949, of Act No. 675, *supra*, it was held that where school buildings were erected and equipped wholly with county funds, without the aid of appropriations from the State, such build-

ings and equipment could not be insured through the State Insurance Fund. Quarterly Report of Attorney General, Vol. 32, page 54. In my judgement, the above-quoted provision of Section 320, as amended, *supra*, was enacted for the purpose of making it possible to insure through the State Insurance Fund buildings and equipment financed wholly by the county, without the aid of appropriations from the State.

Act No. 672, *supra*, contains the same permissive language concerning the insurance of city schools by providing that:

"Any city board of education of a city whose population does not exceed (60,000), may insure all school buildings in the State Insurance Fund under the same terms and upon the same conditions as properties of county school systems are insured." (Emphasis supplied.)

In view of the subsequent and express mention of properties of boards of education, city and county, I am of the opinion that the closing words of Section 317, as amended, *supra*, (i. e., "and all public school buildings together with the contents of all such buildings"), do not indicate a legislative intent that such properties must be insured only through the State Insurance Fund.

The above conclusion is subject to the qualification that, if title to a public school building is, in whole or in part, vested in the State of Alabama, or in any of its agencies or institutions, or if funds provided by the State have been used for the purchase of the land, construction of the building, or the purchase or maintenance of any equipment, furniture, fixtures, or supplies in such building, insurance of the building and equipment through the State Insurance Fund is mandatory. See Section 317, as amended, *supra*. I am not advised as to the extent of the school buildings and equipment in these categories. It may be that appropriations from the State were used in financing the building and equipment of practically all public school buildings in the State, county-owned and otherwise. If that is true, then practically all public school buildings must be insured through the State Insurance Fund, but each building would present its own factual situation.

Very truly yours,

SI GARRETT

Attorney General

August 12, 1952

Hon. W. L. Parrish, Chairman

Board of Revenue and Control

Chilton County

Clanton, Alabama

Counties — Employees — Voters.

1. A county governing body may legally pay employees' salaries during occasional absences on account of illness.
2. A county governing body may provide for time off for employees on election day and may pay such employees' salaries for such absences.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of May 22, 1952, is as follows:

"As Chairman of The Board of Revenue and Control of Chilton County, Alabama, I request your official opinion on the following:

"At a recent meeting of the Board of Revenue and Control of Chilton County, Alabama, and under the Boards power to make rules and regulations with reference to county employees, the following resolution was duly passed by the Board of Revenue and Control of Chilton County, Alabama:

"BE IT RESOLVED AND ORDERED: That effective this date all full time employees employed on a salary basis by Chilton County who are employed by and under the supervision of the County Engineer of Chilton County, Alabama, shall not be required to work on the county roads and bridges on any day in the future on which day any county-wide election is held in Chilton County, Alabama.

"BE IT FURTHER RESOLVED AND ORDERED: That said employees shall have such days off with pay.'

"The employees of Chilton County affected by this resolution are full time employees employed by the month on a salary basis and are engaged in construction and maintenance of roads and bridges in Chilton County on a county wide basis. Their duties carry them out and away from their homes and carry them into parts of the county away

from their homes and voting places. In performing their duties on some occasions some of the employees would not be able to cast his vote at his proper voting place if he is required to work on election day.

"In view of the foregoing, please advise me as follows:

"1. Is the resolution hereinabove set out within the power of The Board of Revenue and Control of Chilton County, Alabama?

"2. Where an employee is employed by the County on a salary basis by the month and occasionally absent from his work, say one day a month due to sickness or some other unavoidable circumstance, should he be paid full time for the month or should one days time be deducted from his salary?"

I will answer your inquiries in inverse order. This office has previously held that it is within the discretion of the county governing body to pay salaries of regular employees who are unavoidably absent on account of illness. Biennial Report of Attorney General, 1930-32, page 635. Quarterly Report of Attorney General, Vol. 7, page 9. Therefore, your second question is answered in the affirmative.

In Quarterly Report of Attorney General, Vol. 51, page 89, it was held that it was within the discretion of the county governing body to provide annual vacations with pay for regular county employees.

In my opinion, it is not only the right of every citizen to cast his vote on election day, but is a duty as well. In view of the above cited opinions, it is my judgment that the county governing body is well within its legal rights in providing time off for its employees to vote. Circumstances requiring that workers on the county roads and bridges perform their duties in remote parts of the county make it reasonable to provide them with an entire day with pay to enable them to vote. Therefore, your first inquiry is answered in the affirmative.

Yours very truly,

SI GARRETT

Attorney General

August 13, 1952

Hon. W. G. Pruett

State Highway Director

State Highway Department

C A P I T O L

Highways and Highway Department — Rights-of-Way.

1. The State Highway Director has the authority to prescribe reasonable rules and regulations prohibiting the use of any

State highway, or right-of-way thereof, for the regular or repeated storing or parking of any vehicle or vehicles, or the use of any part of the right-of-way for regular or repeated standing of any vehicle or vehicles while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or other businesses.

2. The State Highway Director may prescribe rules and regulations prohibiting any roadside stand, service station, or business of any nature, from occupying any part of the right-of-way of any State highway, other than for reasonable egress and ingress.

3. The State Highway Director may prescribe reasonable rules and regulations requiring property owners to move roadside stands, service stations, or any other businesses, which, during the conduct of its affairs, encroaches upon the right-of-way of any State highway, except for reasonable egress and ingress.

4. The State Highway Director may prescribe rules and regulations requiring present property owners to alter existing approaches to their property which is located on the right-of-way of any State highway, between the private property and the traveled portion of the highway, to prevent the use of any portion of the approaches for the regular or repeated storing, standing or parking of any vehicle while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or any other business, so long as reasonable egress and ingress is provided for the abutting property owner.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 15, 1952, is as follows:

"The laws of Alabama provide that the State Highway Director may prescribe any reasonable rules and regulations so as to prevent unnecessary trespassing upon or injury to the highways of the State, or upon any part of the right-of-way of public roads. The roads of the State Highway System extend over the lands of every section of the State and they are adjacent to the properties of many persons. The lands set apart and dedicated as rights-of-way for State highway purposes are by law the responsibility of the State Highway Department (Highway Director). Means should be provided for right-of-way control and protection which must be uniformly applied and interpreted in all sections of the State.

"The State Highway Department (Highway Director) is desirous of promulgating reasonable rules and regulations so as to prevent unnecessary trespassing upon or injury to any of the public roads, bridges, or highways of the State upon which State money has been or may be expended or appropriated or upon any part of the right-of-way of the public roads or highways in the State upon which State money has been or may be expended or appropriated.

"Before formulating such rules and regulations as are desirable, your official opinion is requested on the following questions:

"1. Does the State Highway Director have the right to prescribe a rule and regulation which prohibits the use of any part of the right-of-way of any State highway for regular or repeated storing or parking of any vehicle or vehicles or the use of any part of the right-of-way for regular and repeated standing of any vehicle or vehicles while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or other business?

"2. Does the State Highway Director have the right to prescribe a rule and regulation which would require roadside stands, service stations, businesses of any nature, recreational and entertainment places to be so placed and laid out that all parking, servicing, and viewing areas are entirely removed from the right-of-way of any State highway?

"3. Does the State Highway Director have the right to prescribe a rule and regulation that would require present property owners to move existing roadside stands, service stations, businesses of any nature, recreational and entertainment places to such a position so as to require that all parking, servicing, or viewing areas are entirely removed from the right-of-way of any State Highway?

"4. Does the State Highway Director have the right to prescribe a rule and regulation that would require present property owners to alter existing approaches located on the right-of-way between the roadway proper and the outer edge of the right-of-way of the State Highway Department, so as to prohibit the use of any part of the right-of-way of any State highway for regular or repeated storing or parking of any vehicle or vehicles, or the use of any part of the right-of-way for regular or repeated standing of any vehicle or vehicles while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or any other business, although a permit had been granted in the past by the State Highway Director allowing such approaches to be constructed for use as ingress and egress? Such alterations shall not interfere with reasonable access to the highway as ingress and egress.

"Your early consideration and answer to these questions will be greatly appreciated as the State Highway Department at this time is in urgent

need of this information in order to fulfill requirements being pressed by the Bureau of Public Roads concerning the use of right-of-way on Federal-aid projects."

Title 23, Section 16, Code of Alabama 1940, provides in part as follows: "The department may also prescribe any reasonable rules and regulations so as to prevent unnecessary trespassing upon or injury to any of the public roads, bridges or highways of the state, upon which state money may be expended or appropriated, or upon any part of the right-of-way of any of the public roads or highways in the state upon which state money may be expended or appropriated. . . ."

The power of the Legislature to control the State's highways is absolute, and such control may be delegated to such authority as it may see fit. *McCormick v. South Park Commissioners*, 150 Ill. 516, 37 N. E. 1075. Thus, it may be said that the Legislature of Alabama may delegate to the State Highway Department the power to prescribe all reasonable rules and regulations for the prevention of unnecessary trespassing upon or injury to the highways, roads, and bridges, and the rights-of-way thereof, of the State of Alabama.

The answer to question No. 1 is in the affirmative.

As stated above, the Legislature has the power to control the State's highways, and it also has the right to delegate this power to some other authority. Inherent in this power to control is the power to prevent any use of the highway, and the rights-of-way thereof, inconsistent with the interests of the public.

It is stated in the case of *Birmingham Railway, Light and Power Company v. Smyer*, 181 Ala. 121, 61 So. 354 that:

"Lands once taken for, or dedicated as, public streets are taken for all time for the purpose of providing a means of passage common to all the people, and may be rightfully used in any way that will best serve this purpose. The public thus acquire the right of passage over every part of it, from side to side, and from end to end. . . ."

Therefore, it is my opinion that the State Highway Department has the power to prescribe reasonable rules and regulations prohibiting the use of any State highway, and right-of-way thereof, for the regular or repeated storing or parking of any vehicle or vehicles or the use of any part of the right-of-way for regular or repeated standing of any vehicle or vehicles while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or other businesses, said use being an encroachment upon the rights and interests of the public.

The answer to question No. 2 is in the affirmative.

It is stated in the case of *City of Birmingham et al. v. Hood-McPherson Realty Company et al.*, 233 Ala. 352, 172 So. 114, that:

" . . . 'Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and, as such, it not permitted by the law to be done with impunity.' "

The State Highway Director would be within his authority should he prescribe rules and regulations prohibiting any roadside stand, service station, or business of any nature, which in the course of its business would encroach upon the right-of-way of any State highway, other than for reasonable egress and ingress, from occupying any part of the right-of-way of any State highway.

The answer to question No. 2 is in the affirmative.

As stated in the answer to question No. 2, the State Highway Director has the authority to prohibit roadside stands, service stations, or businesses of any nature from encroaching upon the right-of-way of any State highway in the course of their business, except for reasonable egress and ingress.

Any obstruction of or encroachment upon a highway made without right or proper authorization, constitutes a public nuisance, even though it does not actually operate as an obstruction to travel or work a positive inconvenience to anyone. *Birmingham Railway, Light and Power Company v. Smyer*, supra.

It is my opinion that the State Highway Director has the right to prescribe reasonable rules and regulations requiring property owners to move roadside stands, service stations, or other businesses, if, during the conduct of its business, it encroaches upon the right-of-way of any State highway, except for reasonable egress and ingress.

The answer to question No. 4 is in the affirmative.

"The right of access to and from a public highway is one of the incidents of the ownership or occupancy of land abutting thereon. . . .

"In the exercise and enjoyment of such easement of access, an abutting owner has a right to construct a driveway or other suitable approach in front of his premises, from his land to the traveled part of the highway, if reasonably necessary and if done in such a way as not to interfere with the rights of the public, subject to such reasonable regulations as the public authority may prescribe." 25 Am. Jur., Highways, Section 154, page 448. Citing *Howell et al. v. Board of Commissioners for City of Quitman*, 169 Ga. 74, 149 S. E. 779.

The State Highway Department may not promulgate a rule or regulation which would exclude all access to a State roadway by an abutting landowner; however, it is authorized to designate suitable entrances for parties having a right of access, and to make reasonable regulations to to their construction and use. *Anzalone v. Metropolitan District Commission of Commonwealth of Massachussets*, 257 Mass. 32, 153 N. E. 325.

Although an abutting property holder has the right of egress and ingress from his property to the traveled portion of the highway over the right-of-way of said highway, that right is burdened with the power vested in the public authorities to prescribe reasonable rules and regulations for the location and construction of entrances from the property of abutting property holders to the highway proper over the right-of-way thereof.

Therefore, it is my opinion that the State Highway Department has the right to prescribe rules and regulations requiring present property holders to alter existing approaches located on the right-of-way between the private property and the highway proper, so as to prevent the use of any portion of the approaches, which are on the right-of-way, for the regular or repeated storing, standing, or parking of any vehicle while being serviced, refueled, repaired, adjusted, or being used to conduct sales, trades, or any other business, so long as these alterations do not interfere with reasonable access to the highway as egress and ingress.

Yours very truly,

SI GARRETT

Attorney General

August 19, 1952

Hon. Earl M. McGowin

Director of Conservation

State of Alabama

C A P I T O L

Department of Conservation — Game and Fish — Licenses —
Exemptions — National Guard.

National Guardsmen on State status, that is, who have not been ordered into active federal service, are not exempt under the provisions of Act No. 502, General Acts 1945, page 727, from procuring a hunting or fishing license to hunt or fish in this State.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of May 2, 1952, is as follows:

"On the 8th of June, 1951, your office rendered an official opinion to the effect that a person serving as a member of the Armed Forces of the United States during the Korean conflict is serving during a period of time when the United States is engaged in a war within the meaning of such terms as used in Section 1 of Act No. 502, General Acts 1945, page 727, and, therefore, is not required to procure a hunting license or fishing license to hunt or fish within this State.

"We have received numerous requests from members of the National Guard asking if they too were exempt from the necessity of purchasing a hunting or fishing license. By the term National Guard I do not mean those which have been federalized and are now engaged on active duty. I speak only of those National Guardsmen who are components of the reserve branch of the Service.

"Please let me have your official opinion whether National Guardsmen are covered by Act No. 502, General Acts 1945, page 727."

It is my opinion that National Guardsmen, who are not now engaged on Federal active duty, are not covered by Act No. 502, General Acts 1945, page 727, and are, therefore, required to procure a hunting license or a fishing license to hunt or fish within this State.

The Armed Forces of the United States consists of the Army, the Navy, and the Air Force, and each of these branches of the Armed Forces consists of a regular component and certain reserve components. This general term "Armed Forces" includes any reserve units or individuals thereof while serving in the active Federal service. The Army has the National Guard and the Air Force has the Air National Guard. The National Guard has a dual Federal status; that is, National Guard of the United States and Air National Guard of the United States, but when they are not specifically ordered into active Federal service, they function in their State status as National Guard and Air National Guard and their dual Federal status is dormant. When the National Guard and Air National Guard are functioning in their State status, they do so under the Governor as Commander in Chief and not as members of the Armed Forces of the United States. While serving in their State status as members of the National Guard, they are merely pursuing an avocation to prepare themselves for active military service.

A member of the U. S. Army, Navy, or Air Force can hold no civil office and cannot actively engage in a private business at the same time.

This is not true of the National Guard in the State status. Their military positions are not vocations. They hold civil office and engage in private businesses at the same time. Title 35, Section 37, Code of Alabama 1940, provides that membership in the National Guard or Naval Militia shall not prevent a citizen from holding civil office.

§ 37. Holding military or naval commission or membership in national guard or naval militia shall not prevent a citizen from holding civil office.—Any citizen of this state may accept and hold a commission or warrant in the national guard or naval militia of Alabama or hold enlisted membership in the national guard or naval militia, or a commission in the officers' reserve corps of the army of the United States, or naval reserve of the United States without vacating any civil office, position, or commission held by him; and the acceptance or holding of any such military or naval commission or membership and receiving pay therefrom shall not constitute such holding of an office of privilege and trust under the government of this state and of the United States as shall be incompatible with the holding of any civil office, legislative or judicial, or position or commission under the government of this state."

There is a vast difference between a member of the Armed Forces of the United States on active duty and a member of the reserve component of a branch of the Armed Forces. Section 1 of Act No. 502, *supra*, is as follows:

"No person serving as a member of the Armed Forces of the United States of America shall be required to procure a hunting license or a fishing license to hunt or fish within the State of Alabama during any period of time in which the United States of America is engaged in a war."

It is clearly the intent of the Legislature that, by using the words "members of the Armed Forces of the United States of America," it meant to include active members and not reservists.

It is, therefore, my opinion that members of the National Guard, who have not been ordered into active federal service, are not covered by Act No. 502, *supra*, and must procure a hunting license and a fishing license to hunt or fish in Alabama.

Yours very truly,

SI GARRETT

Attorney General

August 19, 1952

Hon. S. D. McKnight

Superintendent of Education

Marengo County

Linden, Alabama

Marengo County — Schools — Superintendents of Education —
Salaries — Constitutionality.

1. Prior to the effective date (May 16, 1952) of the amendment to the Constitution proposed by Act No. 748, General and Local Acts 1951, page 1297, by imposing new and additional duties upon an officer, the Legislature could increase his salary without violating Section 281 of the Constitution of Alabama 1901.
2. The Legislature may delegate to a local board the power to fix the salary of a public official within limits without such delegation of legislative power being unreasonable.
3. A local act having imposed new and additional duties upon a county superintendent of education and having delegated to the county board of education the power to increase the superintendent's salary within certain limits, said board may grant subsequent increases within said limits.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your letter requesting an official opinion is as follows:

"I enclose copy of Act No. 198 passed in 1949.

"Under the provisions of this Act. the County Board of Education at the commencement of my term of office as Marengo County Superintendent of Education, which term began July 1st, 1949, increased my salary as provided by this Act, could the Board give me an additional increase in salary within the limits prescribed by this Act, which increase would not be more than the maximum prescribed by the first sentence in Section 3 of the Act?"

In my opinion, your inquiry should be answered in the affirmative, that is to say, the board of education may allow an additional increase in your salary within the limits prescribed by Section 3 of Act No. 198, General and Local Acts 1949, page 229.

It has long been established that with the imposition of new and additional duties upon an officer, such as the superintendent of education, his salary may be increased during his term of office without violating Section 281 of the Constitution of Alabama 1901. *Tayloe v Davis*, 212 Ala. 202, 102 So. 433. It should also be noted that Act No. 198, *supra*, was enacted prior to the effective date (May 16, 1952) of the constitutional amendment proposed by Act (joint resolution) No. 748, General and Local Acts 1951, page 1297. Furthermore, since a salary is not a fee, percentage, or allowance, such local legislation is not prohibited by Section 104(24) of the Constitution of Alabama 1901. *Brandon v. Askew*, 172 Ala. 160, 54 So. 605.

By Section 3 of Act No. 198, *supra*, the Legislature has delegated to the county board of education the power to determine the amount of the increase in the salary of the superintendent of education. This increase in salary may vary from \$900 per annum to \$1900 per annum. It has been held that the delegation of such authority to a local board is not an unreasonable delegation of legislative power. *McNiell v. Sparkman*, 184 Ala. 96, 63 So. 977. The Legislature having the power to delegate the authority to set the amount of the increase in the salary of the superintendent of education, it is my opinion that the amount of the increase may be changed from time to time by the county board of education within the limits prescribed. It is obvious that the board of education is in a better position than the Legislature to be familiar with the extent of the burdens of the added duties imposed upon the superintendent of education; and, therefore, would be in a better position to judge and determine the amount of the increase in his salary. Since those burdens may have increased since the board first granted the increase, under the provisions of Act No. 198, *supra*, it is my opinion that the board has authority to grant additional increases.

Yours very truly,

SI GARRETT

Attorney General

September 3, 1952

Brigadier General Walter J. Hanna

Adjutant General

State of Alabama

Montgomery 2, Alabama

Taxation — Tobacco — National Guard — Exemptions — Jefferson County — Opinions Overruled, Modified or Distinguished.

1. The exemption from taxation provided for by Title 35, Section 110, Code of Alabama 1940, is one accruing to the in-

dividual members of National Guard units, who compose the post exchanges or canteens of such units, when such tax exempt articles are purchased through the unit post exchanges or canteens operated in accordance with regulations prescribed by the Adjutant General and approved by the Governor.

2. Title 35, Section 110, Code of Alabama 1940, affords exemption to individual members of National Guard units from the license tax levied by Act No. 414, General Acts of 1947, page 304, when such purchases are made through duly authorized unit post exchanges or canteens operated in conformity with regulations prescribed by the Adjutant General and approved by the Governor.

3. Quarterly Report of Attorney General, Volume 54, page 90, overruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1952, is as follows:

"Reference is made to Section 110, Title 35, Code of Alabama 1940, as amended, which provides for certain gasoline and tobacco tax exemptions in connection with the operation of National Guard post exchanges or canteens, and also to the opinion of the Attorney General of Alabama, dated May 12, 1948, relating to that statute.

"Reference is further made to Act No. 414, General Acts of 1947, page 304, and opinion of the Attorney General of Alabama, dated February 17, 1949, with reference to the applicability to the local tobacco tax imposed by that 1947 statute of the tax exemptions provided by Section 110 of Title 35, Code of Alabama 1940, as amended. In the opinion of February 17, 1949, it was held by the then Attorney General of Alabama that the tax exemption provisions in question did not apply to the 1947 local tobacco tax, which pertains to Jefferson County.

"The National Guard has been and is operating one or more canteens in Jefferson County. The local tobacco tax imposed by the above-cited statute of 1947, has been and is being collected under the provision of that statute and the above-mentioned opinion of February 17, 1949. It is understood that the theory on which the above opinion held the exemption not to apply to this local tax is based on the idea that the tax is imposed upon the individual consumer and that the exemption provided by the above statute first cited applies to the canteen as a vendor and does not apply to the consuming purchaser.

"It has been a legislative policy over many years to grant certain exemptions and privileges to members of the Alabama National Guard as an inducement to their joining the National Guard to receive training for emergency active duty for the State and Nation on a voluntary basis. There is nothing to indicate that the legislative intent was to enable the National Guard post exchanges and canteens to make a greater profit or gain a business advantage in their sales by giving them the tax exemptions mentioned, rather it is believed to be quite clear that the legislative intent was to give an additional privilege, benefit and exemption to members of the National Guard in consideration of their voluntary service therein. It is, therefore, obvious that the benefit of the tax exemption should necessarily be available to the National Guard consuming purchaser to accomplish the purpose of the legislative exemption.

"The National Guard unit commander in Birmingham has had a brief prepared by two officers of the National Guard who are attorneys, in consultation with other experienced attorneys of the Birmingham Bar. This brief has been prepared in the form of a letter on behalf of the unit commander to you, requesting that you reconsider the opinion of February 17, 1949 and reverse, revise and clarify the same to conform to what is believed to be the legislative intent in establishing the above-mentioned tax exemptions. After consultation with this office,

Colonel Brown submitted his letter to me for use in requesting an opinion from you on the main questions discussed in his letter brief regarding the taxation and tax exemption questions involved. The letter brief prepared for Colonel Brown is attached hereto for your consideration, and this office concurs fully in all the opinions and reasonings expressed therein other than those contained in the first two paragraphs, and it is believed that the legal aspects of the taxation questions have been well treated and presented therein.

"In view of the foregoing, your opinion is requested on the following questions:

"(1) Is the tax exemption provided by Section 110, Title 35, Code of Alabama 1940, as amended, intended to pass to the individual National Guardsmen purchasing such tax exempt articles, or is the exemption only to the canteen as a business establishment and the tax required of the individual purchaser?

"(2) Specifically, are authorized purchasers through Alabama National Guard canteens entitled to exemption from the tax imposed by Act No. 414, General Acts of 1947, page 304?

"Your opinion on the above matters will be appreciated at your earliest convenience, as a favorable answer as to the tax exemption with reference to the tax statute in question will be a considerable morale booster

to serve as an additional inducement to aid in recruiting National Guardsmen in the Jefferson County Area."

You request that I review and reconsider a former opinion of this office rendered by my predecessor upon the same matter here presented, and in addition thereto advise you as to my opinion concerning the meaning and intent of Title 35, Section 110, Code of Alabama 1940, and the exemption provided for thereunder. This section is as follows:

"All post exchanges, or canteens owned, operated, and run exclusively by national guard units shall be exempt from the payment of all state, county, city or town licenses and taxes, and shall be exempt from payment of tobacco and gasoline tax to state, county, city or town when operated in accordance with such rules and regulations as the adjutant general may provide and the governor may approve, when the profits of such canteens or exchanges go to the national guard or naval militia units and not to the operators of such enterprises."

In so complying with your request, I have not only reviewed and considered the specific opinion referred to by you (Quarterly Report of Attorney General, Vol. 54, page 90), but also other opinions of this office dealing with this particular subject, together with other statutory provisions which I deem to be pertinent to any determination as to the intent and meaning of the provisions of Section 110, supra.

In the course of such review, I find within the statutory law various exemptions afforded those persons who are members of the State military forces. Among the exemptions considered are those provided for by Title 35, Section 11, Code of Alabama 1940; Title 35, Section 101, Code of Alabama 1940; Title 51, Section 238, Code of Alabama 1940; and Title 51, Section 374, Code of Alabama 1940, as amended. These exemptions are personal in nature and accrue to the individuals concerned rather than to any unit or agency of the Alabama National Guard.

The legislative intent behind the above-mentioned statutes to me is clear and self-evident. Members of the Alabama National Guard have imposed upon them by reason of such membership certain duties and obligations to the State and nation not so imposed upon the other members of our citizenry. Such members are subject to call by the Governor, as Commander-in-Chief, in time of strife or emergency within the State. Members are likewise subject to call to active duty by the Federal government in time of emergency or crisis. They are likewise required to regularly attend drills and encampments as prescribed, and to perform such other duties of a military nature as may be required of them by the Governor, as Commander-in-Chief of the State Militia. The need for State troops is undisputed, and since membership in the National Guard is admittedly oftentimes unattractive, the Legislature, in my opinion, has seen fit to provide certain exemptions in the nature of bounties to encourage and reward membership in the State military forces.

I have likewise reviewed former opinions of this office treating the statutory exemptions above set out, and I find that such opinions uniformly hold that the members of the State military forces are entitled to such personal exemptions. See in this connection Quarterly Report of Attorney General, Vol. 57, page 57; Vol. 51, page 96; Vol. 50, page 137; Vol. 47, page 35; Vol. 37, page 44; Vol. 33, page 125; Vol. 22, page 24; and Vol. 17, page 338.

Turning next to the specific question presented by your inquiry, listed as Question No. 2 therein, and to the opinion of my predecessor concerning same, I can only conclude that such opinion is founded in error for the reason that such opinion fails to take into account the fact that the exemption afforded by Section 110, *supra*, to "All post exchanges, or canteens owned, operated, and run exclusively by national guard units . . . is, in truth and in fact, an exemption accruing to the individual members of such units who compose and constitute the agency so defined as a "post exchange" or "canteen."

In order to properly determine the nature of the exemption provided by Section 110, *supra*, it is necessary to consider the question of just what is a "post exchange" or "canteen." Attached to your request is a copy of Post Exchange Regulations No. 3, dated 25 October 1948, as published by the Adjutant General with the approval of the Governor, in conformity with the requirements of Section 110, *supra*. Study of such regulations convinces me that the "post exchanges or canteens" referred to in Section 110, *supra*, are nothing more than administrative agencies or means established by the members of National Guard units for the purpose of dispensing to themselves certain defined articles in the limited quantities prescribed by such regulations. The individual members of the units themselves constitute the "post exchanges or canteens," for it is only they, individually and collectively, who own and operate the same, and are permitted to purchase therefrom. They are all "stockholders" therein, individually and collectively, on an equal basis, and all profits derived from the operation thereof become a part of their unit fund in which, likewise, they are joint and equal beneficiaries.

Being clear to this conclusion it would, in my opinion, be a perversion of legislative policy and intent to hold that the exemption provided by Section 110, *supra*, accrues only to the benefit of the "post exchanges or canteens," that is, the unit membership as a body, and does not afford exemption to the individual members constituting the group. To so hold would, in my judgment, completely thwart the legislative purpose, intent and spirit in granting such exemption, as well as other exemption of a like nature, to the membership of National Guard units.

I am, therefore, in disagreement with the opinion of my predecessor reported in Quarterly Report of Attorney General, Vol. 54, page 90, and I am of the opinion that Section 110, *supra*, affords exemption to authorized purchasers, through National Guard exchanges and canteens, of the

license tax imposed by Act No. 414, General Acts of 1947, page 304. Such opinion is accordingly overruled and withdrawn.

In answering your specific inquiry, I think that I have likewise answered your further question concerning the exemption provided by Section 110, supra. Aside from the legal proposition of giving effect to the obvious intent of the Legislature in providing such exemption, is the administrative impracticability of otherwise affording such exemption to those entitled thereto. It is obvious that an exemption from cigarette, tobacco or gasoline tax granted to individuals of a group must be administered through some duly established and centralized source of supply for such group, when engaged in retail purchasing in small and limited quantities. This, apparently, the Legislature has accomplished by granting exemption to the agency established by the group for such distribution, and by further prescribing that such purchasing must be done through the established means under rules and regulations adopted and promulgated by the responsible authorities. Any other method could only result in confusion with benefit to none.

Therefore, being of the opinion that National Guard "post exchanges and canteens" and the membership of a National Guard unit are in actuality one and the same, I am of the further opinion that the exemption provided for by Section 110, supra, is one that is intended and should by law accrue to the benefit of the individual members composing such units when authorized purchases are made by them through the duly established and properly operated post exchanges or canteens.

Yours very truly,

SI GARRETT

Attorney General

September 8, 1952

Hon. Bill Dorrough, Commissioner

State Department of Public Welfare

421 South Union Street

Montgomery 5, Alabama

Comptroller — Department of Finance — Travel Expenses.

1. Expenses incurred by persons traveling on official business for the State by reason of storage of vehicles used by them in such official travel is an allowable and reimbursable item of expense when properly claimed and approved.

2. Such item of expense is allowable in addition to the per diem allowance in lieu of subsistence and the mileage allow-

ance of six cents per mile in lieu of actual expenses of transportation as prescribed by Act No. 425, General and Local Acts 1949, page 607.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of August 8, 1952, is as follows:

"Act No. 425, General Acts 1949, page 607 (Title 41, Section 154 as amended) reads as follows:

"Limitation of per diem expenses.—The maximum amount allowable to a person traveling in the service of the State of Alabama or any of its agencies, institutions, boards, bureaus or commissions for expenses other than actual expenses of traveling shall be fixed by the governor at not less than five dollars per day nor more than seven dollars per day, such maximum or limit when fixed from time to time to be uniform in operation as to all persons while said persons are traveling within the state. Persons traveling in the service of the State or any of its agencies, institutions, boards, bureaus or commissions outside the State of Alabama shall be allowed all their actual and necessary expenses, in addition to their actual expenses for transportation, provided such travel shall have first been duly authorized in writing by the governor; provided further, that persons traveling on official business for the state or any of its agencies, institutions, boards, bureaus, or commissions in privately owned vehicles shall receive six cents per mile in lieu of their actual expenses for transportation, provided, however, that the above per diem payment shall not be made for a period in excess of two consecutive months for an employee stationed at the same place in the State of Alabama and after the completion of two consecutive months' period the amount of the per diem shall be reduced to three dollars and fifty cents per day.'

"Please furnish me an official opinion in connection with the following matter. In many Alabama cities and towns there are municipal ordinances which require that automobiles not be parked on the streets in certain areas over night; therefore, when persons are traveling within the state in the service of the State of Alabama or any of its agencies, institutions, boards, or commissions, it is frequently necessary for them to pay for the storage cost of their automobiles in order to comply with municipal regulations.

"In such instances, may this storage cost be allowed in addition to the six cents per mile and the per diem payment under Act No. 425?"

I assume that your inquiry relates to the vehicle storage cost incurred by those individuals traveling on official business for the State, or any of

its agencies, bureaus, etc., in privately-owned automobiles, inasmuch as storage cost for state-owned vehicles has, for a long period of time past, been considered and held to be an allowable and reimbursable item of expense when properly submitted and approved.

I am of the opinion that your inquiry should be answered in the affirmative.

The statutory limits of per diem expenses allowed persons traveling on official business for the State or any of its agencies is found in Act No. 425, General and Local Acts 1949, page 607, which amends Title 41, Section 154, Code of Alabama 1940. The provisions of this Act you have quoted at length in your request.

With reference to persons traveling on official business for the State, and within the limits of the State, Section 154, as amended, *supra*, provides that the maximum amount allowable to such persons for expenses, other than actual expenses of traveling, shall be fixed by the Governor at not less than five nor more than seven dollars per day, while those persons so traveling outside the State are allowed all their actual and necessary expenses in addition to their actual expenses for transportation. Said section further provides that persons traveling on official business for the State in privately-owned vehicles shall receive six cents per mile in lieu of their actual expenses for transportation. In my opinion, the expenses incurred by such persons by reason of storage of privately-owned vehicles used in such official travel is not included within the per diem of the five to seven dollars per day allowed for subsistence, nor the six cents per mile allowance made in lieu of actual expenses of transportation; but is rather a separate and distinct item of expense which may be reimbursed when properly claimed and approved.

Under rules and regulations heretofore adopted and published by the Director of the Department of Finance after approval by the Attorney General, as noted in an opinion found in Quarterly Report of Attorney General, Volume 46, page 21, the travel allowance of not more than seven dollars per day is definitely established and defined as a per diem allowance in lieu of subsistence expenses. Said rules and regulations further provide that:

"The per diem in lieu of subsistence expenses will be held to include all charges for meals; lodgings; personal use of room during daytime; bath; all fees and tips to waiters, porters, baggagemen, bellboys, hotel maids, dining room stewards and hotel servants in connection with subsistence and transportation; laundry; cleaning and pressing of clothing; fans and fires in rooms. The term "Lodgings" does not include berths, compartments, or drawing rooms on sleeping cars, and the expenses thereof are not subsistence expense."

It is obvious from the above that there was no intent on the part of the Legislature nor the administering body, the Department of Finance,

that the per diem allowance should include any expense incurred in the necessary storage of privately-owned vehicles used in official travel for the State. Neither do I feel same to be included within the amount allowed at the rate of six cents per mile in lieu of actual expenses for transportation. Such expense is not an actual expense of transportation such as bus, rail, or plane fare, gas, oil, etc., but rather an item of expense incidental but necessary to the performance of official duties while in travel status. In my judgment, such expense falls within the same category as expenses necessarily incurred for postage, express charges, telephone, or other like items and should be so treated.

You are, therefore, advised that expenses incurred by persons traveling on official business for the State by reason of storage of automobiles used by them in such official travel is an allowable and reimbursable item of expense when properly claimed and approved, and that such item of expense is allowable in addition to the per diem allowance in lieu of subsistence and the mileage payment allowed in lieu of actual expenses of transportation as set out in Act No. 425, *supra*.

Very truly yours,

SI GARRETT

Attorney General

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